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IN THE

Supreme Court of the United States

October Term, 1955

No.

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*

v.

MICHIGAN CONSOLIDATED GAS COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Panhandle Eastern Pipe Line Company (Panhandle), petitioner herein, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered August 1, 1955, affirming in part and reversing in part the judgment of the District Court.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a)* and its memorandum on petition for rehearing (App. 23a) are reported at 226 F. 2d 60. The opinion, as printed in the Appendix, was amended slightly by order of the Court (App. 22a). The opinion of the District Court (R. 1313)** is reported at 117 F. Supp. 551.

JURISDICTION

The judgments of the United States Court of Appeals for the Sixth Circuit were entered August 1, 1955 (App. 20a, 21a). In the time allowed by the applicable rule, petitioner filed a petition for rehearing which was denied October 6, 1955 (App. 22a). Issuance of the mandate has been stayed until January 4, 1956, to allow petitioner to file this petition.

Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

First Case

(1) Where a natural-gas company sues a customer for amounts due under a rate schedule on file with and accepted by the Federal Power Commission, may the defendant collaterally attack the order approving such schedule on grounds that sufficient findings were not made by the Commission when the same defendant was a party to the proceeding resulting in the order, but did not obtain direct review of the order?

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* "App." references are to the printed appendix accompanying this petition.

** "R." references are to the joint appendix prepared for the court below, copies of which are filed with this petition.

(1a) Whether, because the Commission allegedly failed to make necessary findings in adopting a new rate schedule, a court can refuse to enforce such rate schedule on file with and accepted by the Federal Power Commission, in a suit by a natural-gas company to collect the rate contained in the schedule.

(2) Where the Federal Power Commission in a concededly valid order lowers the rate level of a natural-gas company and orders that company to file new rate schedules, is it necessary that the Federal Power Commission, in a later proceeding when it accepts such new rate schedules as being in compliance with the prior order, make findings that each provision of every contract between the gas company and all of its customers which may be affected by the new rate schedule is "unjust, unreasonable," etc.?

Second Case

(1) Whether it is proper in the circumstances of this case to give to statements made in an opinion of the Federal Power Commission the force and effect of an order of the Commission when such statements do not purport to be mandatory and are couched in terms of beliefs and expectations?

(2) Whether the decision of the Sixth Circuit Court of Appeals, holding that respondent, Consolidated, could not obtain injunctive relief against Panhandle for violating an order of the Federal Power Commission until it had invoked the authority of the Commission, effectively bars, on principles of *res judicata*, the claim asserted by Consolidated by way of set-off and counterclaim to a subsequent suit, that the same order of the Commission had been violated?

(3) Where the claim asserted in defense to a suit by a natural-gas company requires the determination of the capacity of a compressor station belonging to the natural-gas company, and where the determination of that capacity is dependent upon problems in the transportation of natural gas of great complexity, may a court, in the absence of a Commission determination of the capacity of the compressor station, entertain such a claim?

STATUTE INVOLVED

SEC. 5 (a) of the Natural Gas Act provides: "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any state, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." 15 U.S.C. § 717d(a).

PRELIMINARY STATEMENT

This petition presents questions as to the impact of the Natural Gas Act on the contractual relations of a natural-gas company and its customer, a distributing utility. In the opinions of the courts below, the controversies were treated as one case; but, in reality, two separate and distinct cases are involved. Accordingly, to simplify the presentation this petition contains a separate statement and argument for each case.

Some facts common to both cases should be mentioned preliminarily. Panhandle Eastern Pipe Line Company is a natural-gas company operating a pipe line which extends from Texas through the States of Kansas, Missouri, Illinois, Indiana, Ohio and into Michigan. Respondent, Consolidated, is a gas utility distributing gas in Michigan, principally in Detroit.

In 1935 Panhandle and Consolidated's predecessor in interest entered into a contract (R. 19a) under which Panhandle agreed to furnish all of Consolidated's gas requirements up to 90,000 Mcf per day (R. 21a). Eventually this contract became Panhandle's Rate Schedule FPC No. 12. In 1940 the maximum amount of gas deliverable under the contract was raised to 125,000 Mcf per day (R. 59a). This contract became Supplement No. 4 to Rate Schedule FPC No. 12. Consolidated's claim to 125,000 Mcf of gas a day is a common denominator of this whole controversy.

The basis for jurisdiction in the District Court was diversity of citizenship between the parties in a case involving more than $3,000. A further jurisdictional basis is found in Section 22, Natural Gas Act, 15 U.S.C. Section 717u.

STATEMENT OF THE FIRST CASE[1]

In September, 1942, the Federal Power Commission entered an order requiring Panhandle and its subsidiaries to reduce their rates and charges and to file new schedules embodying this reduction (R. 1129a). This order was ultimately affirmed by this Court on April 2, 1945. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U.S. 635.

The 1942 order required Panhandle and its then subsidiaries to " . . . file new schedules of rates and charges for or in connection with their transportation and sale of natural gas in interstate commerce" (R. 1135a). In May, 1945, Panhandle tendered such rate schedules (R. 967a, 1140a). The Commission, in June of that year, notified all interested persons and requested comments or suggestions concerning the proposed schedules. Numerous letters were received from state regulatory commissions, customers of Panhandle, and other interested persons.

In July, 1945, the Commission advised Panhandle that the schedules filed in May were not acceptable;[2] that it did not feel that a straight commodity form of rate was proper under the circumstances; and, that it had directed its staff to confer with Panhandle for the purpose of considering another type of rate (R. 1141a). Among the considerations which had been urged upon the Commission by those commenting upon the May proposed schedules was a limitation on Pan-

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[1] In the opinion below this case was referred to as "Counts I, II, III and V" of the complaint.

[2] There was never any question that the May schedules adequately reduced the level of the rates (R. 782a).

handle's maximum daily delivery obligation to certain customers (R. 1140-41a).

Thereafter Panhandle tendered for filing on September 12, 1945, revised proposed schedules of rates and charges.[3] In a letter dated September 11, 1945 (Defendant's Exh. No. 8, 1149a, not printed, but in original record on file with the Clerk) Panhandle called the attention of all of its customers (including Consolidated) to pertinent provisions of the new schedules which accompanied the letter, stating:

> "Attention is called to the following provisions of the schedules:
>
> "(1) Distributors . . . may switch to a firm basis gas heretofore purchased on an interruptible basis to fulfill the present requirements of individual customers using less than one million two hundred thousand (1,200,000) therms per year.
>
> "(2) Requirements of customers whose annual use of gas exceeds one million two hundred thousand (1,200,000) therms must be purchased on an interruptible basis unless such requirements had previously been supplied to the distributor by the Company on a firm basis.
>
> "(3) Any additional commitment for gas for resale by the distributor to any individual customer whose annual requirement exceeds one million two hundred thousand (1,200,000) therms will be classified as 'interruptible.' "

On September 14 the Commission directed that a public hearing be held on September 24 with respect to (1) whether the revised rate schedules should be

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[3] On October 22, 1945, minor amendments to these schedules were filed; and it is to the schedules as amended that the Commission ultimately referred (R. 971a). The changes are not material.

allowed to take effect in whole or in part, and (2) whether all or any part of such revised rate schedules should be rejected (R. 1142a). In this order the Commission found that:

> "Panhandle has sent a copy of the revised proposed rate schedules to each of the State commissions concerned, its distributors, and to counsel for each of the parties in the above-docketed matters." (R. 1141a)

Notice of the hearing with respect to the proposed rate schedules was published in the Federal Register (R. 1081a). After the hearings were held the Commission found that all parties were given full opportunity to be heard

> "... with respect to reasonableness and propriety of the revised rate schedules tendered for filing in purported compliance with the Commission's interim order of September 23, 1942 . . ."

and, that no testimony was offered in criticism of the proposed rate schedules "either as to form or substance" (R. 969a).

In its order of November 2, 1945, the Commission found that the new schedule was in compliance with its 1942 order and with the provisions of the Natural Gas Act; and that it should be accepted for filing and made effective as to all bills regularly rendered on and after November 1, 1942 (R. 971a-972a). The supplement approved by the order of the Commission for Consolidated became Supplement No. 5 to Rate Schedule FPC No. 12. The supplement, a part of the overall rate reduction included "Rate Schedule Gd-1 Deliveries to Utilities—Firm, Resale" and "Rate Sched-

ule Rd-2 Deliveries to Utilities—Interruptible, Resale" (R. 61a *et seq.*). See note 5, *infra.*

The new rate schedule thus approved by the Commission provided for a differential form of rate for deliveries made on a firm basis, that is, a base load rate and a rate for purchases in excess of the base load. The base load was to be determined by the daily average deliveries of therms[4] during the months of June through September. This daily base load was then to be applied to the succeeding twelve months according to the number of days in a billing month. The resulting figure was the base load for such month, and Consolidated was to be charged at the rate of 1.85 cents per therm for any amount of gas delivered up to the base load. Deliveries in excess of the base load were to be billed at a higher rate of 2.6 cents per therm.

An integral part of the differential rate was the provision that:

> "(c) This rate schedule shall not apply to gas purchased by the Utility from the Company for resale to any individual customer whose present, or estimated, annual use of gas exceeds one million two hundred thousand (1,200,000) therms, unless such gas requirements were purchased by the Utility from the Company on a firm basis prior to October 1, 1945." (R. 61a)

The nub of Panhandle's complaint was that by taking gas in violation of the above provision during the four-month base periods, Consolidated improperly inflated its base load and that therefore it should have paid the rate provided in the schedule for gas taken

[4] A therm is a measuring unit which reflects the heating value of gas.

in excess of the properly calculated base load during the succeeding months.[5]

There can be no doubt that the Federal Power Commission actually, by its order of November 2, 1945, put into effect all of Supplement No. 5 to Rate Schedule FPC No. 12, that is, the new schedule which Panhandle had submitted. The order of the Commission makes it clear that the entire schedule as proposed by Panhandle was to go into effect (R. 965a), and the Commission ordered that:

> "The supplements to its rate schedules tendered for filing by Panhandle Eastern Pipe Line Company on October 22, 1945, and more particularly described in the Appendix A hereto attached and made a part hereof, be and the same are hereby accepted for filing in compliance with the Commission's Opinion No. 80 and interim order of September 23, 1942.
>
> *"The supplements to rate schedules referred to in paragraph (a), above, be and the same are hereby made effective as to all bills regularly rendered on and after November 1, 1942."* (R. 972a) (Emphasis supplied.)

The 1,200,000 therm limitation had been debated at length during the hearings which led up to the issuance of the Commission's November 2, 1945, order. At the hearings in September, 1945, testimony was given

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[5] The opinions below create some confusion by referring to interruptible rate schedules (Rate Schedule Rd-2 of Supplement 5 to Rate Schedule FPC No. 12). However, during the period involved no sales or deliveries of gas were made by Panhandle to Consolidated under such schedule and this has been admitted (R. 128a).

on the provision; counsel for various parties, including counsel for Consolidated (which was a party actively participating), discussed and argued this very provision without ever claiming either that it was not properly before the Commission or that the provision would not be effective upon adoption by the Commission of the new schedule. The record is clear on this point (R. 780-782a, R. 930-945a), and neither of the courts below has ever asserted that the 1,200,000 therm limitation was not adopted in the Commission's November 2, 1945 order.

At the beginning of the period in question Panhandle had no way of either discovering or physically preventing Consolidated from violating the rate schedule. It was only in the middle of 1948, after the Commission found that Consolidated was violating the rate schedule, that Panhandle was ordered to install facilities to control the flow of gas (R. 211a-212a, 234a).

Events subsequent to the order of the Commission adopting the new rate schedule bring into sharper focus the problem presented to this Court. Beginning in June, 1947, it became apparent that Consolidated was violating the 1,200,000 therm limitation of the rate schedule (R. 1222a-1234a). And on August 16, 1947, the Commission so found (R. 1030a). On August 19, 1947, the Commission filed an action in the District Court for the Eastern District of Michigan asking for an injunction against the violation of the rate schedule; but, this suit was dismissed by stipulation of the parties (R. 88a-91a).

No valid appeal was taken by Consolidated from the order of November 2, 1945. No attempt to appeal that

order was made until nearly two years later when on September 8, 1947 (R. 1084a) Consolidated filed an application for rehearing of the order which the Commission denied because it was untimely filed. Consolidated's petition to review the November 2, 1945, order was dismissed by the Court of Appeals for the District of Columbia on the ground that, because the petition had not been made during the time allowed by the Natural Gas Act, it had no jurisdiction. *Michigan Consolidated Gas Company* v. *Federal Power Commission,* 167 F. 2d 264.

The instant case was commenced when Panhandle filed its complaint in July of 1948 (R. 6a) alleging violations of the applicable rate schedule and claiming amounts due for gas delivered and unpaid for at the rate for gas taken taken in excess of the properly calculated base load.

The Court of Appeals for the Sixth Circuit affirmed the District Court holding that the new rate schedule upon which Panhandle based its claim could not supersede or modify the provisions in the amended contract of 1935 relating to the quantity of gas to be delivered, since such provisions were not specifically found to be unjust, unreasonable, unduly discriminatory or preferential within the provisions of Section 5(a) of the Natural Gas Act, 15 U.S.C. § 717d(a). The court held that the 1,200,000 therm provision was without "legal effect" since (App. 8a),

> "The Commission did not take the required statutory steps to put the terms and conditions of service established in Gd-1 APPLICABLE (c) into effect so as to supersede the contractual provisions

of August 31, 1935, as amended, binding on both Panhandle and Consolidated.'"[6]

ARGUMENT, FIRST CASE

Questions 1 and 1a. The threshold question in this case and a fundamental one in the administration of the Natural Gas Act is, assuming that findings under Section 5(a) were necessary but not made insofar as the 1,200,000 therm limitation is concerned, whether the order of November 2, 1945, putting the therm limitation into effect can be attacked in the present proceeding. Consolidated was a party to the proceeding leading up to this order, and, in fact, participated extensively in the hearings regarding the therm limitation. It, along with all other parties, received ample notice of everything that was done. Under the provisions of the Natural Gas Act, Section 19(b), 15 U.S.C. § 717r(b), Consolidated, as a party which might have felt itself aggrieved by the order, could have petitioned for review. It did not do so within the time allowed by the Natural Gas Act. Almost two years elapsed before it sought by direct review to test

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[6] The District Court had so held, but in addition had held that the 1,200,000 therm limitation was not related to the base load provision and that since no charge was provided for by the schedule for gas taken in violation of the limitation, he could not give judgment. This is, of course, an erroneous decision, and the Court of Appeals did not even deign to mention it. While no specific penalty is applicable to the volumes of gas unlawfully taken by Consolidated to inflate its base load, it is Panhandle's position that none is needed since the volumes so taken must be deducted in computing the proper base load— and that all volumes taken during the following winter in excess of the proper base load must be paid for at the higher differential rate specifically provided for in the rate schedule.

the validity of the Commission's action; and this review was held to have been attempted too late.

As between Panhandle and Consolidated, under the decisions of this Court, the question whether the rate schedule was validly adopted or not, is immaterial, for it is not subject to collateral attack. Consolidated has claimed—and the decision of the court below improperly substantiates this claim—that it can refuse to pay the charges imposed by the rate schedule adopted by the Commission, and attack in this proceeding the order of the Commission approving the charges. Whether or not the requisite findings were made and whether or not the order adopting the rate schedule was validly entered, are considerations completely immaterial under the present circumstances. Rather, the sole inquiry should be whether the order of the Commission putting the rate schedule into effect can be collaterally attacked in this proceeding. The court below permitted such a collateral attack and therefore, it is submitted, rendered a decision in conflict with decisions of this Court as well as other courts and courts of appeal.

In *Federal Power Commission* v. *Colorado Gas Company*, 99 L. ed. (Advance p. 401), decided March 28, 1955, the question was whether the Court of Appeals for the Tenth Circuit could, in a review proceeding, overturn a prior order of the Commission as to which no review had been sought under Section 19(b) of the Natural Gas Act. The order involved was a prior order approving a merger. In that order, as a condition to its approval of the merger, the Commission prohibited the inclusion of certain operating expenses of the natural-gas company in its cost of service. In a review of a later rate proceeding the prohibition was attacked and the Court of Appeals sus-

tained the gas company's contention. This Court said (99 L. ed. at 407) that the gas company:

> "... cannot now be allowed to attack an officially approved condition of merger while retaining at the same time all of its benefits. The impropriety of the attack is rendered twofold *because it is not made in the merger proceeding but is attempted in a separate rate proceeding.*" (Emphasis supplied.)

It may safely be asserted, although the instant case arises in a different context, that for the same reason Consolidated cannot be allowed to attack in this case the order of the Federal Power Commission approving Panhandle's rate schedules.[7]

In *Callanan Road Improvement Co.* v. *United States,* 345 U.S. 507, 512, the Interstate Commerce Commission, after hearing, held that the appellant was not entitled to engage in towing service under an existing certificate. A complaint in the District Court to set aside that order was filed by the appellant, claiming that the original certificate had been restricted by the amendatory order. This Court denied the appellant's right to make such an attack, saying:

> "... The appellant cannot now raise the question of the power of the Commission to modify the original certificate .... Whether the Commis-

[7] Other cases are in point. *Yakus* v. *United States,* 321 U.S. 414, 429; *Securities and Exchange Com'n* v. *Central-Illinois Security Corp.,* 338 U.S. 96, 143; *Adams* v. *Nagle,* 303 U.S. 532; *Stanley* v. *Board of Supervisors,* 121 U.S. 535, 550. In *Reconstruction Finance Corp.* v. *Lightsey,* 4th Cir., 185 F. 2d 167, 169, the court said:

> "It is sufficiently clear that appeal, where it exists, rather than collateral attack, is the remedy of parties disappointed by the decisions of quasi-judicial bodies in matters properly before it. ..."

sion's action . . . was right or wrong, the jurisdiction of the Commission was not destroyed thereby. A direct attack in such circumstances was the remedy.

". . . It [appellant] cannot in this collateral proceeding attack the validity of the Commission's order of March 7, 1944. . . ." (Citing cases)

Consolidated attempted, as has been indicated, to obtain a review of the order of November 2, 1945, almost two years after the date of the order; and, it specifically assigned the question whether the therm limitation was validly adopted (R. 1084a-1085a). *Michigan Consolidated Gas Co.* v. *Federal Power Commission,* 167 F. 2d 264. The Court of Appeals for the District of Columbia, on motion to dismiss, dismissed the petition for review, stating:

". . . Since neither the petition for review nor the application for rehearing was filed within the time allowed by the Natural Gas Act . . . [§ 19(b)] we lack jurisdiction to review these orders."[8]

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[8] In *Michigan Consolidated Gas Co.* v. *Federal Power Commission,* 3d Cir., 203 F. 2d 895, 901, Consolidated sought to review other orders of the Commission prescribing Panhandle's obligation to deliver gas. It was contended that the Commission had acted arbitrarily in refusing to allot Consolidated any portion of Panhandle's increased capacity, although Panhandle's new "rolled-in" rate had been imposed upon Consolidated. The Court of Appeals said:

". . . This contention is in reality an attempt by Michigan Consolidated to attack indirectly and collaterally the Commission's Opinion No. 214 and accompanying order which approved the 'rolled-in' rate. But that opinion and order have long since become final and not subject to review."

The decision of the court below is in conflict with these cases, and accordingly, this petition for certiorari should be granted. Both courts below suggested that Consolidated may have been misled; but the Court of Appeals held that "this consideration is not conclusive" (App. 12a). Even if it were assumed that Consolidated was misled, a collateral attack could not be allowed. Moreover, it is clear (see pp. 7-8 and pp. 10-11, *supra*) that Consolidated *could not* have been misled.

If the decision of the court below remains the law, the validity of every rate schedule on file with the Commission is suspect and could be collaterally attacked at the whim of any distributing company notwithstanding it may have been a party to the proceeding leading up to the adoption of the rate schedule.

The rates of every natural-gas company must be filed and kept on file with the Commission. Sections 4(c) and (d), Natural Gas Act, 15 U.S.C. § 717c(c) and (d). Subsection (d) provides that unless the Commission otherwise orders,

> "... no change shall be made by any natural-gas company in any such [filed] rate, charge, classification, or service, ... except after thirty days' notice to the Commission and to the public. ..."

And, it has been consistently held, that where the rates of a natural-gas company were filed with the Federal Power Commission they are the only lawful rates which can be charged or accepted. Until changed by the Commission they are binding on all persons concerned.

Thus, in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Commission,* 341 U.S. 246, 251-2, this Court held that a purchaser of electricity.

> " . . . *can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.*
>
> "We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its [*sic*] opinion, it is the only or the more reasonable." (Emphasis supplied.)

See also, *Phillips Petroleum Co.* v. *Federal Power Commission,* Nos. 5095, 5096, November Term, 1955, United States Court of Appeals for the Tenth Circuit, decided November 16, 1955. The only effect of the decision below is to permit Consolidated to pay a rate different from that on file with the Commission.

Thus, the decision in the court below conflicts with the collateral attack cases cited above, and, in effect, is in conflict with those cited immediately above which hold specifically that the only rate (including all conditions affecting such rate) which can legally be applied is the one on file with the Federal Power Commission. It is submitted, therefore, that on this basis alone the petition for certiorari should be granted.

Question 2. Even assuming, *arguendo,* that the court below could review the order adopting the new rate schedules, and refuse to enforce the schedule on file, Panhandle does not concede that the findings, which the courts below held were required, were necessary

in the circumstances of this case. The holding in this regard by the court below raises an important problem in the administration of the Natural Gas Act which this Court, in the interests of proper procedure in the future, should resolve.

The level of Panhandle's rates was lowered by the Commission in a valid 1942 order which was reviewed by this Court. Panhandle was ordered to file rate schedules incorporating the rate reduction. This "interim" order has been characterized by this Court as the first step in the establishment of a rate. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 584. Such an order contemplates a second step, that is "the adjustment of a rate schedule conforming to that level *so as to eliminate discriminations and unfairness from its details.*" *Ibid.* (Emphasis supplied.) That is what the Commission did when, in its order of November 2, 1945, it found that the rate schedules submitted by Panhandle were "in substantial compliance" with the interim order adopting the rate level and were "in substantial compliance ... with the provisions of the Natural Gas Act, and should be accepted for filing" (R. 972a).

The question is whether it was necessary for the Commission, in approving such new rate schedules applicable to all customers of a pipe line[9] to make findings specifically abrogating each and every contract provision which may be affected thereby, however incidentally.

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[9] No one disputes the sufficiency of the finding of the Commission that the schedules were in compliance with the Natural Gas Act.

Requiring the Commission to delve into a morass of contractual provisions contained in each contract between a natural-gas company and every one of its customers would impose an intolerable burden upon the Commission and completely frustrate the effective administration of the Act. The erection of such a requirement is nowhere required by the Act. The provisions of the Act are met when the findings specified in Section 5(a) are made in a proceeding initiated by the Commission and directed toward the *level* of a natural-gas company's rates. In the circumstances of this case, the higher level of Panhandle's rates was contained in and indeed provided for by the contracts between Panhandle and its customers, and, the effect of the Commission's 1942 order was to abrogate these contractual provisions. No one could now suggest that that order was invalid because each term of each contract relating to rate level or structure was not specifically found to be unjust and unreasonable.

After a full hearing covering all the provisions of the new schedules, the Commission adopted them for sixty-six of Panhandle's then customers in the States of Kansas, Missouri, Illinois, Kentucky, Indiana, Ohio and Michigan (R. 974a-975a). The obvious intent of the Commission in directing the filing of *new* schedules and of having its staff participate in their preparation, and in holding hearings regarding them was to develop a workable, uniform *rate schedule* applicable to all the customers along the line.[10] Such a procedure would not only eliminate differences

[10] Such a procedure was entirely wasted if all that could be done was to lower the rate. It would not be necessary to have *new* rate schedules if the only thing to be changed was the price of gas.

and discriminations—affecting the rate level—contained in various contractual provisions antedating passage of the Natural Gas Act,[11] but would permit the adopting of a new, uniform method of selling gas. It could hardly be expected that the Commission would attempt to set a separate reasonable rate to be charged to each of Panhandle's customers.

No case found supports the conclusion of the court below. *Sierra Pacific Power Co.* v. *Federal Power Commission*, 223 F. 2d 605, and *Mobile Gas Service Corp.* v. *United Gas Pipe Line Co.*, 215 F. 2d 883 (see note 13, *infra*) might be said to support the decision of the court below by inference. However, those cases involve the situation where there was no antecedent finding of the Commission regarding the rate level of the natural-gas company.[12]

The importance of this fundamental problem in the administration of the Natural Gas Act, a problem which will be constantly recurring, is manifest. Every natural-gas company (including independent producers now) is subject to a complaint and a proceeding to reduce its rates.

The Court presently has pending before it four connected cases[13] involving the situation where a natural-

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[11] *Natural Gas Pipeline* case, *supra*.

[12] It may also be observed as to these cases, that both involved direct appeals from the agency and are distinguishable on that basis.

[13] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation and Federal Power Commission*, No. 17, October Term 1955; *Federal Power Commission* v. *Mobile Gas Service Corporation*, No. 31, October Term 1955; and *Pacific Gas and Electric Company* v. *Sierra Pacific Power Company*, No. 53, October Term 1955; *Federal Power Commission* v. *Sierra Pacific Power Company*, No. 51, October Term 1955.

gas company or an interstate carrier of electricity has filed a new tariff which increases contract rates. In each case one of the primary issues is whether a contract on file with the Federal Power Commission remains legal and binding until and unless such contract is found specifically to contravene the provisions of the Act. Those cases arose under Section 4 of the Natural Gas Act and Section 205(a) of the Federal Power Act, which contemplate the so-called "filed rate" procedure. The question in these cases is related to that in this case, since if this Court reverses the decisions of the Third Circuit and especially the Court of Appeals for the District of Columbia, it would follow that rate schedules voluntarily filed by Panhandle and accepted for filing by the Commission were necessarily binding upon Consolidated.

However, the converse is not true. The instant case arose under Section 5(a) of the Natural Gas Act and involves, as we have pointed out, the second step in the rate-making procedure. It is submitted that all necessary findings had already been made when the Commission adopted the new schedules.

The rates which the Commission in its 1942 order had found to be "unjust, unreasonable and excessive" in connection with the transportation of natural gas (R. 1135a) were found in existing contracts between Panhandle and its customers, and by its order of November 2, 1945 (R. 965a, 972a) the Commission found that the rate schedules tendered were in substantial compliance with its prior order and with the provisions of the Natural Gas Act and should be accepted for filing. These findings comply strictly with the requirements of Section 5(a) of the Natural Gas Act, for the Commission (a) found that Panhandle's rates

incorporated in existing contracts, were unjust and unreasonable, and (b) by its order of November 2, 1945, determined in the language of Section 5(a) the "just and reasonable rate, charge, classification ... or contract to be *thereafter* observed and in force." (Emphasis supplied.) If the Commission is to be allowed, as it was by the decision of this Court in the *Natural Gas Pipeline* case, *supra,* to enter upon a procedure involving successive stages in fixing the rates, the findings mentioned above should be adequate to support the adoption of Panhandle's new rate schedules.

Moreover, the decision of the court below is predicated upon a hypertechnical distinction between the rate level and "terms and conditions of service" (App. 9a-12a). We do not view, and it seems clear that the Commission did not view, that the therm limitation contained in the rate schedules was a term or condition of service. In the order of November 2, 1945 (R. 965a, 968a) approving the rate schedules, the Commission stated that "the hearing was limited to matters relating to proper rates which would comply with the Commission's interim order of September 23, 1942." Still later, on August 6, 1946, the Commission entered an order fixing a date of hearing to be held concerning appropriate terms and conditions of service, including rules and regulations to govern curtailment and interruption of gas service "to be embodied in present effective rate schedules filed by Panhandle" (R. 1146a). It was found that the Commission had not, up to that time, dealt with "terms and conditions of service."

Thus, the Commission did not view the therm limitation as a term or condition of service. Rather it was regarded (by the Commission and everyone for that matter) as a part of the *rate structure;* and, it was approved as such.

Moreover, no provision in the rate schedule prevented Consolidated from taking the contract volume of gas. The rate schedule provided in effect that the base load would not include gas taken in order to serve an individual customer more than 1,200,000 therms; and if gas was so taken on a firm, rather than an interruptible basis, the rate would be 2.6¢ per therm. It is submitted that Consolidated cannot, especially now, accept the benefits of an order reducing the rates which its contract bound it to pay, and at the same time attack the rate classification established by the order.[14] *Callanan Road Improvement Co.* v. *United States,* 345 U.S. 507, 513, and cases cited; *Federal Power Commission* v. *Colorado Gas Co.,* 99 L. ed. (Advance p. 401).

The fundamental question presented to the Court, therefore, is whether the findings made by the Commission in 1942 at the first stage of the adoption of a rate can support the action taken by the Commission during the second stage of the rate fixing. The decision of the court below is unrealistic in that it fails to give proper weight to practical necessities in the administration of the Natural Gas Act. Congress cannot have intended to so hamstring the Commission in the exercise of its proper functions.

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[14] The Commission found on November 2, 1945 (R. 972a):

> "The rate schedules tendered for filing by Panhandle and designated as supplements to existing rate schedules on file with the Commission . . . provide a reduction in annual revenue *in excess* of $5,094,384 per annum as provided in the Commission's Opinion No. 80 and interim order of September 23, 1952 . . . ." (Emphasis supplied.)

The therm limitation was an integral part of that rate reduction.

Aside from the fact that requiring findings such as those envisioned by the court below as to each and every provision of every contract between a natural-gas company and its customer is unrealistic and unreasonable, it is clear that the decision of the court below fails to give proper weight to the findings actually made by the Commission. If the decision of the court below is allowed to stand, it will be clear that even though the Commission validly adopts a *rate structure*, it cannot classify service for purposes of that rate structure and this holding, we think, is at once an egregious error and one which should be reviewed by this Court.

STATEMENT OF THE SECOND CASE[15]

Panhandle, by its complaint as supplemented (R. 142a, 322a), sought to recover over $600,000 for deliveries of gas to Consolidated during the months of July through October, 1948. Consolidated admitted that the payments were due to Panhandle (District Court Opinion, R. 1324a). However, it contended that Panhandle's deliveries during this period fell below the 125,000 Mcf per day required by the 1935 agreement between Panhandle and itself, and that under the agreement it was entitled to withhold certain amounts from such payments as a set-off against its cost of manufacturing gas to compensate for Panhandle's allegedly deficient deliveries.[16] Consolidated

[15] This case was referred to in the opinion below as "Counts IV and VI" of the complaint.

[16] The set-off and counterclaim were claimed to arise under paragraph 4, Article XVIII of the 1935 agreement (R. 39a) and under Article XV (R. 35a).

also counterclaimed for an amount over and above the set-off claimed.

The alleged deficient deliveries were the result of Panhandle's compliance with an order of the Commission issued in July of 1948. For a specified emergency period, Panhandle was in effect ordered to curtail deliveries to Consolidated. The controversy in this case involved an attack by Consolidated on this order and on a supplemental opinion in connection therewith. In the alternative, Consolidated claimed that Panhandle violated the Commission's order and was, accordingly, liable by way of set-off and counterclaim to the extent of such violation under the 1935 contract, (Note 16, *supra*) for the cost of manufacturing gas to make up the deficiency in deliveries.

On July 17, 1948, the Commission handed down its Opinion No. 166 and accompanying order. The proceedings there involved were separate from and for a different purpose than those attendant upon the 1,200,000 therm limitation. The Commission temporarily suspended the contractual obligation to deliver to Consolidated up to 125,000 Mcf per day. The Commission, after hearings directed Panhandle to file a supplement to its rate schedule[17] and provided that it should make available to Ohio Fuel Gas at a point east of Panhandle's Edgerton compressor station an additional 10,000 Mcf of gas per day,[18] that Panhandle should make deliveries to Consolidated and to Michigan Gas Storage Company of such volumes of gas as might be available after making deliveries to all of

[17] This became Supplement No. 11 to Rate Schedule FPC No. 12.

[18] Delivery of this gas had been requested by the War Production Board to ameliorate an existing shortage of gas (R. 175a).

its other customers east of the Edgerton station, including those to Ohio Fuel, in accordance with certain percentages of such available volume of gas. See FPC Opinion No. 166 (R. 172a, *et seq.*).

The Commission first found that the practice of Panhandle in permitting Consolidated to take 125,000 Mcf a day had the effect of granting to Consolidated an undue preference and advantage while, at the same time, subjecting other customers to undue prejudice and disadvantage (R. 206a). In its opinion, the Commission noted that previously, it had ordered Panhandle to deliver specified volumes of gas to Michigan Gas Storage Company (R. 203a) because up to that time Consolidated had never taken the maximum allowed by its contract.[19] The Commission then concluded that it was unreasonable that Consolidated receive the maximum volumes under its gas purchase contract while deliveries to other customers such as Gas Storage were limited to only a portion of the gas to which they were similarly entitled (R. 206a).

The Commission in this proceeding was attempting to utilize Panhandle's full capacity and make an equitable distribution of gas available during a period of emergency shortage. The record (R. 1078a) contains a map of the Panhandle system as it existed at the time in question and reference thereto may be helpful.

In Opinion No. 166, after detailed consideration of many problems as to gas service west of Panhandle's

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[19] While the proceedings relating to Gas Storage were pending before the Commission, Consolidated undertook interruptible sales to industrial customers which resulted in its taking up to the 125,000 Mcf maximum and placing in storage the difference between that amount and its firm demands (R. 204a-205a).

Edgerton compressor station, the Commission reached in its discussion "The Situation East of Edgerton" (R. 190a).[20] It found that the total requirement on Panhandle's system east of its Edgerton station would be 300,000 Mcf per day during the summer months (R. 190a). Later, discussing the two main customers east of Edgerton, the Commission stated in relation to their claims to take gas,

> "... If Consolidated is entitled to take 125,000 Mcf a day, then Gas Storage is entitled during the storage season to take 100,000 Mcf a day. *The difficulty is that there is not 225,000 Mcf of gas a day available for distribution between them.*" (R. 206a) (Emphasis supplied.)

One of the problems which confronted the Commission was the physical capacity of the Edgerton station. The record showed that the physical capacity of that station was from 265,000 Mcf to 270,000 Mcf per day on the average (R. 191a). The opinion stated, however, that other evidence in the record indicated that larger volumes had been delivered. The Commission expressly refused to determine the capacity of the station; but, it used 270,000 Mcf per day capacity as the basis for altering the contractual obligations of the parties involved (R. 191a).

In its order adopted in conformity with Opinion No. 166, the Commission ordered (R. 233a) Panhandle to deliver to Consolidated and to Michigan Gas Storage,

> "... such volumes of natural gas as may be available after making deliveries to all of its other

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[20] The capacity of this station limits Panhandle's ability to make deliveries to all of its customers east of it. It is a gateway through which all of Panhandle's gas going into Michigan and Ohio must pass.

customers east of its Edgerton Compressor Station. . . ."

Another matter taken up in Opinion No. 166 was the petition of Michigan Public Service Commission which alleged that it was necessary for a large and continuous supply of natural gas to reach Detroit. The Commission was asked to give priority to deliveries to Gas Storage and Consolidated under their contracts before making deliveries to direct or indirect, interruptible or off-peak consumers (R. 214a-215a). The order of the Commission (paragraph (E) R. 234a) denied this petition. See Opinion No. 166 (R. 215a-216a).

Consolidated refused to accede to the Commission's order. It refused to pay Panhandle for gas delivered, claiming a set-off under the 1935 agreement for the cost of manufacturing gas to make up the difference between the contractual quantity, 125,000 Mcf per day, and the amounts actually delivered. The Commission was advised of this fact and, on August 25, 1948, issued its Supplemental Opinion No. 166A (R. 155a-158a). The Commission stated:

" . . . We expressly found from the record in these proceedings that the volumes of natural gas available to Michigan Consolidated from Panhandle during the period May 15, 1948 to October 31, 1948, *would be less than the 125,000 Mcf per day and in Paragraph (B) of our order of July 17, 1948, provided the basis upon which deliveries are to be made to Michigan Consolidated.*

"Clearly, our order of July 17, 1948, modifies the obligation of Panhandle to deliver 125,000 Mcf per day to Michigan Consolidated at Detroit and the invoking by Michigan Consolidated of Paragraph 4 of Article XVIII of the contract of

> August 31, 1935 (Panhandle's rate Schedule FPC No. 12) *is precluded by such order.* Furthermore, the action of Michigan Consolidated under Paragraph 4 of Article XVIII of the contract of August 31, 1935 (Panhandle's Rate Schedule FPC No. 12) and the action of Panhandle in increasing deliveries of natural gas to Michigan Consolidated through reduction of deliveries to other customers is contrary to and in violation of the Commission's orders issued herein and the provisions of the Natural Gas Act." (R. 157a) (Emphasis supplied in part.)

After the issuance of this opinion, Consolidated brought an action for an injunction to compel Panhandle to deliver 125,000 Mcf of gas to it and to construct facilities necessary to do so. Among the complaints alleged by Consolidated in that case was that Panhandle was,

> "... operating its pipe line system in such a way that the daily deliveries of natural gas into and through the Edgerton Station to defendant's customers, including plaintiff, east thereof are less than the maximum delivery capacity of said station. ..." (80 F. Supp. at 28.)

The District Court dismissed the complaint upon the motion of Panhandle and the Federal Power Commission, among others, on the grounds that the delivery of gas to Consolidated by Panhandle, as it was affected by the capacity of the Edgerton station and additions thereto, was within the primary and exclusive jurisdiction of the Commission. *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, E.D. Mich., Sept. 17, 1948, 80 F. Supp. 27. This was barely two months subsequent to the entry of the Commission's order and Opinion No. 166 and less than a month

after Opinion No. 166A. Interestingly enough, the Court of Appeals for the *Sixth Circuit* affirmed this decision upon the ground that the exercise of jurisdiction by the District Court would invade the province of the Federal Power Commission (173 F. 2d 784).

Consolidated also petitioned the Court of Appeals for the District of Columbia Circuit for review of Opinions Nos. 166 and 166A (R. 1055a). This petition was abandoned (R. 1057a) by stipulation between Consolidated, the Federal Power Commission, and Panhandle.

In its original answer to Panhandle's complaint, Consolidated denied that its contractual right to 125,000 Mcf had been superseded by the above-mentioned opinions and order of the Federal Power Commission (R. 240a, 336a). It claimed, via a counterclaim, that Panhandle had failed to deliver 125,000 Mcf per day and was, accordingly, liable under the contract for the deficiency (R. 131a, 133a). Nearly two years later, Consolidated amended its answer to set up the additional defense that Panhandle had failed to deliver to it the quantities of gas contemplated by the order of the Commission in 1948.[21] And two years after this amendment it set up another defense that Panhandle had breached its contract obligations in failing to provide adequate facilities at its

[21] It is Panhandle's position that Consolidated was estopped to assert a violation of the Commission's order since, in its letters of set-off, it made no such claim. Rather, in those letters it claimed that the contract continued to govern regardless of the Commission's order. Under the decisions of this Court and others, it could not alter the ground of its set-off after litigation began. *Ohio & Mississippi Ry. Co.* v. *McCarthy*, 96 U.S. 258; *Lerman* v. *Fruit Processors*, 191 F.2d 349.

Edgerton station, and in failing to use such facilities at their capacity during the effective period of the order discussed above (R. 400a-401a, 406a-407a, 473a-474a).

The District Court granted judgment to Panhandle for the $600,000 it claimed and held that the order of the Commission of July 17, 1948, effectively modified the contractual obligation. This disposed of Consolidated's claim to recover by way of set-off or otherwise for manufacturing the full deficiency between the amount delivered during the emergency period and the contractual amount. As to the claim that Panhandle had breached its obligation in failing to provide adequate facilities,[22] and the claim that Panhandle had failed to deliver to Consolidated the quantities of gas contemplated by the Commission's order of July 17, 1948, the District Court held that any such defense was within the primary jurisdiction of the Commission.[23]

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[22] The court had already granted summary judgment on the counterclaim (R. 319a).

[23] The District Court said (R. 1328a):

> ". . . Both matters involved intricate problems of service as between different users and different geographical sections and must be decided with the perspective and expertise which only the Commission could bring to such deliberations.
>
> "The authority of the Commission over these matters, as set out in that opinion, cannot now be by-passed under the guise of a proceeding for damages. To hold Panhandle liable in damages for the reasons advanced by Consolidated is but another way of regulating activities which Congress has entrusted to the Commission. Any private remedies in these premises which Consolidated might otherwise have had under the Agreement of 1935 must give precedence to the regula-

The Court of Appeals did a curious thing. It held that the order of July 17, 1948 was effective to modify the contractual obligation to deliver 125,000 Mcf a day to Consolidated. The court held, however, that Opinion No. 166A was merely an "interpretation" of Opinion No. 166 and that therefore no order effectively superseded the contractual right of Consolidated to claim damages caused by wrongful deficiencies in delivery.[24] The court affirmed the District Court in so far as it refused to entertain Consolidated's claim that the shortage of gas was caused by Panhandle's neglect or failure to provide adequate facilities at Edgerton station. However, it reversed the District Court's holding that the question of violation of the Commission's order was within the primary jurisdiction of the Commission.

The gist of the court's decision was that to the extent that Panhandle failed to deliver through its Edgerton compressor station the full capacity of that station, Consolidated had a cause of action for damages measured by the cost of manufacturing such gas and accordingly that its claimed set-off and counter-

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tory powers of the Commission and Consolidated must secure Commission sanction for damage claims as well as claims for specific enforcement before it has standing to request the application of the coercive power of this Court. Otherwise, Panhandle may be penalized for alleged failure to perform its contract when such performance would have been contrary to the public interest and forbidden by the Commission."

[24] Opinion No. 166A had stated that, " . . . the invoking by Michigan Consolidated of [the set-off and damage provisions of the contract] is precluded" (R. 157a).

claim were valid to that extent.[25] The court reached this conclusion by relying on the statement in Opinion No. 166 that the Commission expected Panhandle to curtail interruptible deliveries in order to deliver through Edgerton the largest volumes of gas possible, and held (App. 18a):

> "We construe the order as granting to Consolidated and Michigan Gas Storage priorities over interruptible customers west of Edgerton in the volume of gas to be delivered by Panhandle at Edgerton up to the capacity of that station. It follows that, if Panhandle failed to deliver to Consolidated and Gas Storage in the percentages established and up to the capacity of Edgerton Station such volumes of natural gas as were available after making deliveries to Panhandle's other customers east of Edgerton Station, Panhandle is liable ... ."

ARGUMENT, SECOND CASE

Question 1. The court below upheld Consolidated's claimed set-off and additional counterclaim for alleged deficient deliveries of gas during the emergency period involved, on the basis of two assumptions. First, it assumed that the Commission had *ordered* Panhandle, at the risk of incurring substantial damages, to put through Edgerton station the full physical capacity of that station. Secondly, it assumed that Panhandle was *required* to curtail deliveries to interruptible customers west of the station if that was necessary to insure operation of Edgerton at full ca-

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[25] The court also held that Panhandle was liable for the cost of manufacturing gas long after the emergency period. While this holding was erroneous, it is not separately argued herein. Panhandle reserves its position in this matter because, if it prevails, the decision below on this question will also fall.

pacity.[26] It concluded, therefore, that if Panhandle failed in either respect, liability attached under the contract.

At the outset, it must be pointed out that the court's interpretation of the Commission's order cannot be logically supported. The order accompanying Opinion No. 166 nowhere requires Panhandle to curtail interruptible sales west of Edgerton. Rather, the Commission expressly declined to order Panhandle to do this. In the Opinion, the Commission found that it would be unfair to curtail interruptible sales elsewhere so as to assure uninterrupted deliveries in Michigan, and stated (R. 215a):

> " . . . it is doubtful that we could conclude that interruptible industrial sales made directly or indirectly along the Panhandle System west of its Edgerton compressor station in the summer months . . . should be curtailed. . . ."

In reaching its conclusion, the court below relied upon the portion of Opinion No. 166, which, after noting that the dominant factor with respect to the supply of gas east of Edgerton was the physical capacity of the station, stated (R. 216a):

> " . . . we believe that Panhandle will exert every reasonable effort to deliver through that station the largest volumes of gas possible; and we shall expect that, if necessary to do so, and to the extent required, Panhandle will make appropriate curtailment of interruptible deliveries . . . ."[27]

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[26] It also assumed that Panhandle could invariably interrupt deliveries west of Edgerton. See, however, n. 27 and n. 33, *infra*.

[27] The record actually shows that on September 17, 1948, Panhandle attempted curtailment of some interruptible customers

The action of the court below in treating these expectations, these precatory statements, as an order, is clearly erroneous and in conflict with numerous decisions of this Court. It has long been held that such statements cannot be construed as orders.

In *United States* v. *Atlanta B. & C. R.R.*, 282 U.S. 522, 524, 527, the Interstate Commerce Commission had found the amount to be included in the balance sheet of the railroad representing investment in road and equipment and had stated:

> "The company will be *expected* to adjust its accounts in accordance with this finding. . . ." (Emphasis supplied.)[28]

This Court held that the finding was not an order under the Urgent Deficiencies Act and characterized it "as an opinion as distinguished from a mandate." See also *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618.

In *Shannahan* v. *United States*, 303 U.S. 596, 599, this Court denied review of a determination of a carrier's status under the Railway Labor Act because the

> ". . . decision is not even in form an order. It 'had no characteristic of an order, affirmative or negative.' . . . But even if this difficulty is overlooked, others are insuperable. The decision neither commands nor directs anything to be done. 'It was merely preparation for possible action in

west of Edgerton by as much as 50% (R. 276a) but that this was resisted by the customers. By the time the Commission obtained an injunction against Panhandle's customers, however, the emergency period had virtually run its course (R. 274a-284a).

[28] The parity of the language used by the FPC in this case and the ICC in the *Atlanta* case is striking.

some proceeding which may be instituted in the future.' "

In the instant case, the court below made into an order the precatory statements of the Commission quoted above, and thereby at this late date bound Panhandle to do something which the Commission itself had never ordered. Because this decision is in conflict with the decisions cited above, certiorari should be granted.[29]

Question 2. The claim that Panhandle was not, during the period involved, operating its compressor station at the maximum delivery capacity had already been held by a District Court and by the Sixth Circuit Court of Appeals to be a matter which could not be litigated prior to Commission action. *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 80 F. Supp. 27, *affirmed*, 173 F. 2d 784. The instant litigation involved the very same controversy except that in the prior case the suit was for an injunction. In the District Court opinion, 80 F. Supp. at 30-31, Opinion No. 166 was referred to and the court said:

"... The Commission expressly refused to order the defendant to act in accordance with the expectations it there expressed. Plaintiff may not substitute a new lawsuit in this court for the exclusive statutory method of review in Sec. 19(b)."

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[29] The Sixth Circuit Court of Appeals had already held in effect as to this same controversy that the statements of the Commission now relied upon were not an order. *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, 790, quoted *infra*. Another *res judicata* aspect of the Sixth Circuit's earlier decision is discussed below.

The Court of Appeals, 173 F. 2d at 790, stated:

> "Much of the information as to the technical and practical phases of the Panhandle system necessary for the determination of issues here involved, is already in the Commission's possession. The problems to be met call for judgment within its peculiar and expert experience. ... In its opinion the Commission said it expected Panhandle to curtail gas deliveries to interruptible customers if necessary to do so and to the extent required to operate the Edgerton Station at capacity. *It is not an unusual practice either by court or Commission, to grant opportunity in advance of mandate, with the exercise of power reserved for failure to comply. Consolidated has not invoked the authority of the Commission to the full extent of its regulatory powers. Until it has done so there is nothing for a court appropriately to decide.* It is not for us to suggest the mechanism of invocation. It will be time enough to appraise the method when, either upon direct appeal under § 19, 15 U.S.C.A. § 717r or in review of an original proceeding, the issues are presented after exhausting administrative remedies." (Emphasis supplied.)

As is apparent, the decision in this case precludes Consolidated's claim in the instant litigation; and, the court below, although it cited (App. 6a) its prior decision, failed to accord it any effect. The decision not only of the District Court but of the Sixth Circuit Court of Appeals itself had required Consolidated, if it was to state a claim based on the capacity of the Edgerton Compressor Station, to apply to the Commission to establish facts necessary to its claim. That was a sound decision, but, even if the decision were erroneous, it is *res judicata* as between Panhandle and Consolidated now. The complaint for injunction was

dismissed because it was held that the court had no jurisdiction to entertain Consolidated's claim in the absence of prior resort to the Commission. Panhandle and Consolidated were parties to that case. Consolidated's claim was decided adversely to it on the ground that the Court lacked jurisdiction. Since the same issue is presented in the instant litigation, and since Consolidated has neither resorted to the Commission nor obtained direct review, it cannot now relitigate its prior claim.

In this regard the decision of the court below conflicts with applicable decisions of this Court. *Baldwin* v. *Iowa State Traveling Men's Ass'n,* 283 U.S. 522; *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371; *Stoll* v. *Gottlieb,* 305 U.S. 165; *Partmar Corp.* v. *Paramount Theatres Corp.,* 347 U.S. 89.

Question 3. Laying aside the important questions as to the interpretation of the order of the Commission by the court below and its failure to give conclusive effect to the former decision regarding this same claim of Consolidated's, there is still a very basic aspect of the decision of the court below which warrants review by this Court. That is, the question of primary jurisdiction. The court below held that Panhandle would be liable to Consolidated in damages for the difference, if any, between the full capacity of Edgerton station and what was actually delivered (App. 18a). The Commission, in Opinion No. 166 recognized that the controlling fact as to the delivery of gas to customers east of Edgerton was the capacity of the station at Edgerton.

The Commission undertook to modify the contract between Consolidated and Panhandle to alleviate a

critical shortage of gas. It did this using 270,000 Mcf per day as the capacity of Edgerton station, the gateway through which all the gas going east had to pass. While the Commission might have thought that the capacity was in excess of 270,000 Mcf, it did not determine what the actual capacity was.[30]

In this situation, if Consolidated thought that Edgerton's capacity was not being fully utilized, or, if it was dissatisfied with the Commission's use of the 270,000 figure, complaint could have been made to the Commission, or, review of the order could have been obtained. Consolidated did neither.[31]

The decision of the Sixth Circuit Court of Appeals in 1949, 173 F. 2d 784, correctly held that Consolidated

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[30] It may be expected that whatever the capacity was, it was not too far in excess of 270,000 Mcf, for the Commission used that figure as the basis for its determination of the rights and obligations of all the parties. Certainly the capacity was insufficient to deliver the full contractual amount to Consolidated during the period involved.

[31] Panhandle contends that the Commission used 270,000 Mcf as the capacity of Edgerton, and gave Panhandle a discretion regarding curtailment of interruptibles west of Edgerton; and that Panhandle actually delivered an amount in excess of 270,000 Mcf and complied with the order in the manner intended by the Commission. Under Sections 14 and 20 of the Act, 15 U.S.C. §§ 717m and 717s, the Commission had power to compel, at its own or Consolidated's instance, compliance with the order if a violation occurred. Since Consolidated did not invoke the administrative remedy and since it did not complete an appeal under Section 19(b) of the Act, 15 U.S.C. § 717r(b), it cannot now complain that Panhandle did not comply with the order. Consolidated's set-off and counterclaim constitute a collateral attack upon the order which should not have been entertained.

could not advance the claim that Panhandle was violating the order of the Commission without prior reference to the Commission. Since the Commission refused to, and indeed never has sought to determine the capacity of the Edgerton station (the controlling fact upon which Consolidated's claim of a violation of the Commission's order rests), the court below should not have entertained Consolidated's claim. Assuming that a court would ultimately have jurisdiction to entertain such a claim, it could not do so in the absence of the Commission determination mentioned above.

It is Panhandle's position that there can be no claim by Consolidated for any deficiencies in delivery since it failed to exhaust the Commission remedies available to it to obtain the vital capacity determination. *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, *supra.* This decision was clearly in accord with many decisions of this Court.

It is necessary to consider what is involved in a determination of the capacity of the compressor station.[32] A gas pipe line may be likened to a vessel containing a liquid from which many interrelated spouts protrude. As a matter of physics, taking liquid from any one of the spouts will lower the fluid content throughout the system. A determination of capacity of a compressor station cannot be made in a vacuum, for it involves multitudinous considerations not only of complex transportation problems but of technical matters as well. Obviously, if all the gas which was introduced into the Panhandle pipeline was taken by

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[32] The court below held (App. 17a) that the question whether Panhandle had complied with the Commission's order "... presents the usual questions of law and fact which a court is authorized to handle and which require no special expert knowledge."

customers west of Edgerton, there would be no gas to utilize the capacity of the station. On the other hand, even though no gas was taken prior to the Edgerton station, there would be a limit to the amount of gas which could be compressed and put through that station. The situation is not so simple in actual practice. There are demands on every part of the pipe line system; and, what these demands will be cannot be determined in advance of the gas being taken from the system. There are many compressor stations. The capacity of any one compressor station will vary from hour to hour, from day to day, depending on the changes in the many factors which determine capacity. Some of the considerations are the number of compressor engines in the station, and their horsepower, whether all are in use or whether necessary maintenance work puts some out of commission. A very significant factor is the pressure of the gas immediately before it enters a given compressor station (suction pressure) and this, of course, will be largely dependent upon how all the other compressor stations prior to the one in question are operating, and upon what are the demands on the rest of the pipe line system.[33] Any unexpected demand or lack of demand for gas on

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[33] This factor is of tremendous significance in this case in view of the claim and the decision below that Panhandle was required to curtail interruptible deliveries west of Edgerton so that the compressor station at Edgerton would operate at maximum suction pressure. It should be pointed out here, as we have elsewhere, that Panhandle actually did undertake to curtail such deliveries and it became necessary before the curtailment could be accomplished to obtain an injunction against the customers who were resisting the curtailment order. Obtaining this injunction took thirty days and in the circumstances of this case the lapse of that time was a factor to be considered in determining the capacity of Edgerton Station (R. 274a-284a).

the upstream side of a compressor station will cause wide fluctuation in capacity. The pressure of gas immediately after compression (discharge pressure) is another important consideration, and it will depend, in addition to the number and horsepower of the engines working, upon the quality and strength of the piping, the temperature of the gas, the maximum safe working pressure limit of the engines, and the managerial decision as to whether to overload existing engines and other facilities.

The question here is whether or not a court should determine a fact so complicated and so clearly within the technical competence of the Federal Power Commission as is the capacity of Edgerton compressor station at any given period. The District Court in the instant case found that to hold Panhandle liable in damages for failure to deliver what the court might find to be the capacity of Edgerton would be "but another way of regulating activities which Congress has entrusted to the Commission" (R. 1328a). The court required Consolidated to go first to the Commission. "Otherwise," it said, "Panhandle may be penalized for alleged failure to perform its contract when such performance would have been contrary to the public interest and forbidden by the Commission." *Ibid.*

It is submitted, that to allow the court below to open up now the question of the capacity of Edgerton station would permit the absolute frustration of the Commission in any attempt it made to meet emergency situations and to allocate gas among *all* of the customers of the pipe line. No pipe line could willingly cooperate with a Commission order like that of July 17, 1948, if it would, as Panhandle is here, be faced with litigation for years to come arising out of technical matters

within the competence of the Commission, like the capacity of its compressor stations. The doors of the Commission were open to Consolidated if it felt that Panhandle was refusing or failing to comply with the Commission's order and there, we submit, was the forum.

Premature judicial intervention may easily defeat the basic legislative intent that full use should be made of an agency's specialized understanding within a particular field. This is the main purpose behind the concept of primary jurisdiction. Emphasizing, as we must, the fact that the capacity of the Edgerton station is the crucial determinant in so far as Consolidated's claim is concerned, it seems clear that the court should have refused to entertain the claim because of Consolidated's failure to pursue the administrative remedy. *Illinois Commerce Commission* v. *Thomson,* 318 U.S. 675.

Where, as in the case of the capacity of Edgerton station, the factual question involved is intricate and technical, an agency specifically designated to deal with it should do so in the first instance. *Armour & Co.* v. *Alton RR.,* 312 U.S. 195, seems almost squarely in point. The issue before the Court was whether under the facts the railroad was required to deliver its shipments of livestock at such a location and in such a manner that it need pay no yardage charge. Armour & Company's complaint had been dismissed by the District Court on the ground that the issues presented administrative problems necessitating primary resort to the Interstate Commerce Commission. The complexities of the factual questions involved, particularly questions relating to "complex transportation problems" required, this Court held, the application of

the primary jurisdiction doctrine. As was pointed out above, complex transportation problems and technical questions are involved in determining for any time or period the capacity of Edgerton station; and, it is submitted that the claim of Consolidated should not have been entertained by the court below.

The capacity of Edgerton station is certainly not a question of law within the peculiar competence of the courts. Even if the abstract physical capacity of Edgerton could be determined by a court based upon evidence of skilled technicians, such a determination would be of no value, for enforcing the determination might involve taking gas from someone somewhere else on Panhandle's system, an action which the Commission may well have determined should not be done. A determination by the Federal Power Commission here was required because the inquiry was essentially one of complex fact and discretion in technical transportation matters. As Mr. Justice Brandeis said in *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291:

> "... that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

When the Commission was discussing what it believed Panhandle would deliver through Edgerton station (assuming that this amounted to an order) it did not say that Panhandle would be required to deliver the "capacity" of that station. Rather, it said, "we believe that Panhandle will exert every reasonable effort to deliver through that station the largest

volumes of gas possible" (R. 216a). This is far different from the technical physical capacity of the station. The quoted language means that taking into consideration all the other demands upon Panhandle's system, Panhandle should deliver as large a volume of gas as it was able to. Construing the order as requiring interruption of some deliveries west of the station, as did the court below, does not solve the problem, either. For, as the District Court said, "intricate problems of service as between different users and different geographical sections" must be resolved before the quantity of gas that might have been delivered through Edgerton could be determined. In short, only the capacity of Edgerton for the purposes of the Commission's order is relevant.

This Court recently had before it the case of *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Commission,* 341 U.S. 246. There the problem was whether it was "open to the courts to determine what the reasonable rates during the past should have been." As the Court there said, paraphrasing for the purposes here, it is not the technical physical capacity of Edgerton station which Consolidated may claim, but that capacity as embodied in an order in which the Commission determines the rights of buyer and seller. The court might think one capacity reasonable, but in the context here the Commission had to determine the capacity and independently of Commission action no right was created which the courts may enforce (341 U.S. at 251).

It is submitted that the decision of the court below was in flagrant contradiction of the decisions of this Court holding uniformly that matters such as those in-

volved in this case are within the primary jurisdiction of the regulatory agency.

Whether this is a case where Consolidated's claim ought to be dismissed entirely or held pending reference to the Commission need not now be considered. See, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Commission, supra.* In light of the other considerations heretofore advanced, it is sufficient at the moment to show that the court below was in error in presuming to decide the claim advanced by Consolidated involving, as it did, complex technical questions which a court should not try.[34]

Apart from the legal necessity of invoking the primary jurisdiction of the Commission, in the light of the history of this litigation, it appears that the court below reached a rather lopsided view of the relative positions of Panhandle and Consolidated. It cannot escape the attention of this Court that the Commission itself had said on August 25, 1948, in Opinion No. 166A, that Consolidated was precluded, under its order, from withholding from or charging Panhandle for the cost of manufacturing deficiencies in deliveries. Moreover, and still during the emergency

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[34] Throughout the history of this long and complicated litigation, the District Court adhered to the view that Consolidated's claim was within the primary jurisdiction of the Commission. Primarily on this basis, it granted in June, 1949, Panhandle's motion for summary judgment (filed in November, 1948) as to Consolidated's counterclaim (R. 319a). Some years later, in April, 1952, Consolidated petitioned for reference of the claim to the Federal Power Commission. Panhandle then opposed the granting of the petition on a number of legal and equitable grounds, including the delay in filing (R. 433a *et seq.*) The decision of the Court of Appeals has injected a new element in the case, one which could not have been met below.

period, the District Court for the Eastern District of Michigan (80 F. Supp. 27) had held that the question whether Panhandle was violating the order of the Commission was a matter within the primary and exclusive jurisdiction of the Commission.

In the face of the Commission's assumption of jurisdiction over the problem in its Opinions Nos. 166 and 166A, and despite a specific mandate, not only by the District Court but also by the Sixth Circuit Court of Appeals itself (173 Fed. 2d 784), Consolidated has never obtained the necessary Commission determination. Yet, the Court of Appeals for the Sixth Circuit now says that the court has jurisdiction without reference to the Commission. It simply brushed aside the Commission's action as mere "interpretation" and ignored its own prior decision.

It seems only fair that Panhandle should not now have to face a damage claim for alleged violation of an "order" which the Sixth Circuit Court had already held created no right in favor of Consolidated because it lacked an essential determination by the Commission, and which the Commission itself had held precluded Consolidated's set-off and counterclaim.

CONCLUSION

The decision of the court below, as has been shown, presents a number of very important problems generated by the impact of the Natural Gas Act upon the relations of a natural-gas company and its customer, a distributing utility. The importance of the problems cannot be gainsaid, for prior to this case there have been few suits between natural-gas companies and their customers which involve the application of orders of the Federal Power Commission and the powers of

the Commission under the Natural Gas Act in relation to the contractual obligations of a gas company and its customers.

First Case. It is respectfully submitted that the court below should not have permitted a collateral attack on the Commission's order of November 2, 1945. Commission action, like court action, must be finalized at some point. Moreover, the ruling of the court below raises important questions regarding the sufficiency of the findings of the Commission in the abovementioned order, particularly in the light of what was happening. If the Commission is to be required as suggested by the court below to make findings abrogating every provision of myriads of contracts between a natural-gas company and its customers when it is implementing a prior order to decrease the rate level of the natural-gas company, then the Commission will be enmeshed in a hopeless jumble of contracts, contractual provisions, and amendments thereto, and will be required to make findings in the language of Section 5(a) not only as to provisions of existing contracts clearly affected by its order, but also collateral provisions as to which its order may be only remotely connected.

Second Case. The decision of the court below presents a very practical problem of great importance regarding the claim by Michigan Consolidated that Panhandle violated a Commission order which required Panhandle to deliver less gas than was called for by the contract between Panhandle and Consolidated. It is submitted that before a natural-gas company should be placed in this situation, the requirements imposed upon it by the Commission should at least be incorporated in an order and in any event should be clearly

delineated by the Commission. Morever, there should be an end to the litigation of claims such as that presented by Consolidated. As shown in the argument, this very same claim was litigated once before and has now been resurrected in defense of Panhandle's suit for money concededly due. The argument advanced herein that the claim should have received the expert attention of the Federal Power Commission, it is submitted, is conclusive.

WHEREFORE, this petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review its judgment.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

(Filed Aug. 1, 1955, Carl W. Reuss, Clerk)

Nos. 12200, 12201

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michigan Consolidated Gas Company, No. 12200, Appellant

v.

Panhandle Eastern Pipe Line Company, Appellee.

Panhandle Eastern Pipe Line Company, No. 12201, Appellant,

v.

Michigan Consolidated Gas Company, Appellee.

Appeals from the District Court of the United States for the Eastern District of Michigan, Southern Division.

Dated August 1, 1955.

Before ALLEN, MILLER and STEWART, Circuit Judges.

ALLEN, Circuit Judge. These consolidated appeals attack a judgment of the District Court in an action filed by plaintiff-appellant Panhandle Eastern Pipe Company, hereinafter called "Panhandle," against Michigan Consolidated Gas Company, hereinafter called "Consolidated." Panhandle is a producer of natural gas which operates a

pipe line system from Texas to Michigan, and Consolidated is a utility distributing natural gas in Detroit and the Detroit metropolitan area, and Western Michigan. In appeal 12201 Panhandle attacks that part of the judgment denying Panhandle recovery on Causes of Action or Counts I, II, III, V, and VII of its complaint and supplemental complaints and denying interest prior to the date of the entry of judgment on [2] recovery granted to Panhandle in the amount claimed in Counts IV and VI of the complaint. In appeal 12200 Consolidated appeals from that part of the judgment which grants Panhandle recovery of $601,354.39 against Consolidated, together with interest from the date of entry of judgment. Consolidated also appeals from the judgment that Consolidated take nothing by its counterclaim.

In 1935 Panhandle and Consolidated entered into a contract which, with later amendments, provided that Consolidated should buy all of its natural gas from Panhandle, but not in excess of 125,000,000 cubic feet per day. After the enactment of the Natural Gas Act of June 21, 1938, 15 U. S. C., Section 717, this contract and the amendments thereto were filed and became effective as supplements to Rate Schedule FPC No. 12. On September 23, 1942, the Federal Power Commission, hereinafter called the "Commission," after various hearings, entered an order requiring Panhandle and certain subsidiaries to reduce their rates and charges and file new schedules embodying this reduction. On April 2, 1945, the United States Supreme Court affirmed this order. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U. S. 635. On October 22, 1945, Panhandle tendered for filing supplements to its previous rate schedules which were approved by the Commission November 2, 1945, in an order making such rates effective on and after November 1, 1942. Among the rates approved was Supplement No. 5 to Rate Schedule FPC No. 12 containing RATE SCHEDULE Gd-1 which governs "Deliveries to Utilities-Firm, Resale." This rate

schedule, which is the basis of the principal question presented in appeal 12201, is printed in the margin.[1]

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[1] RATE SCHEDULE Gd-1.

Deliveries to Utilities-Firm, Resale

APPLICABLE

(a) This rate shall apply to all natural gas purchased on a firm basis by the Utility for resale to domestic and other customers, except such natural gas as the Utility shall purchase, under any other rate schedule of the Company available to the Utility.

(b) Subsequent to October 1, 1945, the Utility, at its option, may purchase gas under this rate schedule for resale to any individual customer whose present, or estimated, annual use of gas is less than one million two hundred thousand (1,200,000) therms and whose gas requirements were purchased by the Utility from the Company on an interruptible basis prior to October 1, 1945.

(c) This rate schedule shall not apply to gas purchased by the Utility from the Company for resale to any individual customer whose present, or estimated, annual use of gas exceeds one million two hundred thousand (1,200,000) therms, unless such gas requirements were purchased by the Utility from the Company on a firm basis prior to October 1, 1945.

RATE

(a) For all gas delivered hereunder, each month, in Indiana, Ohio and Michigan:

for that number of therms herein defined as "base load" one and eighty-five hundredths (1.85) cents per therm.
for that number of therms in excess of "base load" two and six-tenths (2.6) cents per therm.
(b) Determination of "base load" for each billing month.
(1) The "daily base load" applicable to each period of twelve (12) billing months shall be the average number of therms delivered per day during the four (4) consecutive months of June to September, both inclusive, immediately preceding such period. Provided, however, if the Company, due to its inability or on its own initiative, fails to make delivery of normal requirements or agreed amounts, such curtailed deliveries and the days on which made shall be excluded in the determination of "daily base load."

(2) The daily base load shall be determined once each year as soon after October 1st as practicable, and the daily

[3] In 1947 Panhandle complained to the Commission that Consolidated, which at the time controlled the physical equipment for delivery in Detroit, was taking gas in violation of the 1,200,000 therm limitation of RATE SCHEDULE Gd-1 APPLICABLE (c). Panhandle requested that it be permitted, in accordance with the contract of August 31, 1935, to examine Consolidated's books and records in respect of sales to individual customers covered by the 1,200,000 therm limitation Gd-1 APPLICABLE (c) but its requests were refused. On August 8, 1947, the Commission in a letter charged that Consolidated was receiving gas from Panhandle contrary to the provisions of Gd-1 APPLICABLE (c). Consolidated replied that with reference to the resale of gas received from Panhandle it was not subject to regulation by the Commission. On August 16, 1947, the Commission embodied in specific findings its charge that Consolidated was violating Gd-1 APPLICABLE (c). On August 19, 1947, the Commission filed an action in the Federal Court for the Eastern District of Michigan against Panhandle and Consolidated, praying for temporary and permanent injunction against the resale practices in question. Within a week this suit was dismissed without prejudice. On September 8, 1947, Consolidated filed an application for rehearing on the order of November 2, 1945, and for vacation of the Commission's finding of August 16, 1947. As to the order of November 2, 1945, the application was held to be untimely filed and the Commission dismissed the application. An ap- [4] peal taken from this order was dismissed by the Court of Appeals for the District of Columbia, *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 167 Fed. (2d) 264. In an order entered December 12, 1946, the Commission, as

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base load so determined shall be effective for the immediately succeeding twelve (12) months' period, beginning with the October billing month.

(3) The "base load" shall be the daily base load multiplied by the number of days in the billing month or shall be the total number of therms delivered, whichever is less.

a result of hearings and of voluntary agreement reached by Panhandle and certain distributing utilities, established emergency curtailment of service under rules and regulations which were continued in force by subsequent orders until November 25, 1947, and later extended until June 1, 1948. On July 17, 1948, the Commission filed its Opinion No. 166 and an order of the same date, which provided for distribution of definite amounts of gas to The Ohio Fuel Gas Company until April 30, 1949, and also that "of such volumes of natural gas as may be available after making deliveries to all of its other customers east of its Edgerton [Indiana] Compressor Station" Panhandle should make deliveries to Consolidated and to Michigan Gas Storage in certain percentages which are printed in the margin.[2] The order also provided that Panhandle install physical means of controlling the delivery of natural gas to Consolidated at Detroit and deliver such gas to Consolidated at Detroit without restriction as to locality of resale.

August 18, 1948, Consolidated filed an action for specific performance of its contract of August 31, 1935, as amended, praying that the court require installation by Panhandle of additional facilities at the Edgerton Compressor Station and compel Panhandle to operate so as to insure as near as reasonably possible a continuous supply of gas in the volume of 125,000,000 cubic feet per day. This case was dismissed by the District Court upon the ground that the controversy was exclusively within the jurisdiction of

[2] Panhandle shall deliver to Michigan Consolidated 52% and to Michigan Gas Storage 48% of such available volumes of natural gas until such date as the total volumes delivered to both such companies from and after May 15, 1948, shall have reached a proportion of 55.6% to Michigan Consolidated and 44.4% to Michigan Gas Storage; and, from such date until October 31, 1948, such volumes of gas as may be available for delivery to these two companies shall be delivered by Panhandle on a daily basis in the proportion of 55.6% to Michigan Consolidated at Detroit and 44.4% to Michigan Gas Storage. Any variation in the daily delivery to either customer from the aforesaid percentages shall be adjusted within seven days; or; . . .

the Commission. This court affirmed the judgment in *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 Fed. (2d) 784. In *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 Fed. (2d) 942, an action for declaratory judgment involving similar issues, this court [5] reversed a judgment of the District Court granting a temporary injunction to prevent curtailment of gas delivery from the pipe line to the distributor.

On July 30, 1948, Panhandle filed the complaint herein, charging in Counts I, II, II and V that by reason of alleged violations of the 1,200,000 therm limitation in RATE SCHEDULE Gd-1 APPLICABLE (c) Consolidated had not paid the full amount owing for gas delivered during the billing periods, October 1, 1946, through September 30, 1947, and October 1, 1947, through September 30, 1948. It claimed that the compensation due Panhandle for the periods involved should be computed by excluding from the "base load" amounts of gas taken in excess of the 1,200,000 therm limitation and that under RATE SCHEDULE Gd-1 RATE (a) the 2.6 rate instead of the 1.85 rate should be charged for the number of therms delivered in excess of the "base load." Consolidated had paid at the 1.85 rate for these amounts of gas delivered. Counts I, II, III, and V prayed for judgment for such amounts as computed at the 2.6 rate, including interest at 6% per annum from the date of the bills rendered.

In Counts IV and VI Panhandle set up that $601,354.39 plus interest owing to Panhandle for gas delivered to Consolidated had been deducted and withheld by Consolidated as claimed setoff for gas manufactured by Consolidated in order to fill alleged deficiencies in delivery during the period from July 23, 1948, through October, 1948. Consolidated admitted that it had not paid for gas delivered by Panhandle, but claimed that under the amended contract of August 31, 1935, and also under the Commission's order of July 17, 1948, Panhandle was liable to reimburse it for the cost of manufacturing gas during the period of de-

ficiency deliveries. In Count VII of the complaint Panhandle claimed that Consolidated had unlawfully inflated the "base load" by excluding from its computation of the daily "base load" certain days in July, August, and September of 1948, when plaintiff delivered less than 125,000,000 cubic feet per day. These deficiencies were in conformity with the Commission's order of July 17, 1948. Panhandle asserted that by applying the correct "base load" computation a bill of $157,541.16 with interest was due to Panhandle.

Consolidated filed a counterclaim, claiming reimbursement for the cost of manufacturing such gas for certain days in December of 1946, in January and February of 1947, in anuary of 1948, in August, September, [6] and October of 1948. The total amount claimed in the second amendment to the counterclaim was $1,500,000. The District Court gave judgment for Consolidated on Counts I, II, III, and V, for Panhandle on Counts IV and VI, refused the interest prayed for by Panhandle from the date of bills rendered prior to the entry of judgment, rendered judgment for Consolidated on Count VII and rendered judgment against Consolidated on its counterclaim.

Consolidated contends that under the Natural Gas Act, 15 U. S. C., Section 717 (b), the Commission had no power to adopt or approve Gd-1 APPLICABLE (c) because it prohibits the resale of gas to new large industrial customers of the local utility. Section Gd-1 APPLICABLE (c) imposes no prohibition on sale to domestic consumers and no limitation on the use of gas resold to domestic consumers. What Gd-1 APPLICABLE (c) provides is that certain rates applicable between Panhandle and Consolidated shall not apply in the circumstances defined therein. The District Court decided correctly that, while Gd-1 APPLICABLE (c) may indirectly affect local distribution of gas by Consolidated, its primary purpose is the application of the provision to an interstate transaction, the purchase of gas by Consolidated on a firm basis from Panhandle, to

interstate rather than to local sales. Cf. *Ambassador, Inc.*, v. *United States*, 325 U. S. 317. The contention on this point must be overruled.

The judgment as to Counts I, II, III, and V must be affirmed for the reason as held by the District Court, that Gd-1 APPLICABLE (c) has no legal effect. The Commission did not take the required statutory steps to put the terms and conditions of service established in Gd-1 APPLICABLE (c) into effect so as to supersede the contractual provisions of August 31, 1935, as amended, binding on both Panhandle and Consolidated. It is conceded by the parties and the Commission decided that under the contract as amended Consolidated has a right to receive from Panhandle, on a firm basis, up to 125,000,000 cubic feet of gas per day at specified rates. But Panhandle claims that Gd-1 APPLICABLE (c), if effective limits this right. While under 15 U. S. C., Section 717d (a) the Commission had authority to establish limitations modifying the contract between Panhandle and Consolidated as an incident to its power to regulate rates (*Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co., supra*), Section 717d (a) requires that such action be based upon an express [7] finding that the contractual provision in question is unjust, unreasonable, unduly discriminatory, or preferential. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575. In its order of September 23, 1942, the Commission, having found under Section 717d (a) tha rates and charges theretofore made, demanded, and received by Panhandle were unjust, unreasonable, and excessive, ordered Panhandle to file new schedules of rates and charges to reflect the reduction ordered. Panhandle framed the revised schedules and after full hearing the Commission approved and made these rates effective by its order of November 2, 1945. No findings were included in the order of September 23, 1942, nor in the order of November 2, 1945, to the effect that other practices or provisions of the contract of August 31, 1935, than the rate pro-

visions were unjust, unreasonable, unduly discriminatory, or preferential. Panhandle, however, points out that the revised schedules put into effect November 2, 1945, were filed, not by the Commission but by Panhandle, under Section 717c (d). When a utility files new or amended rates under this section, Panhandle contends the findings essential under Section 717d (a) are not required.

Assuming but not deciding that findings are not necessary under Section 717c (d), (Cf. Administrative Procedure Act, Title 5, § 1007[b]), we think Panhandle's contention cannot be sustained. The fact that the Commission, instead of directly establishing new rates, ordered Panhandle to frame new rates in accordance with its order of September 23, 1942, is not decisive. When the Commission ordered Panhandle to submit new rates, Section 717d (a) necessarily applied. The rates were filed on behalf of the Commission and were adopted by the Commission as its own in the order of November 2, 1945. This in legal effect was the equivalent of rates initiated by the Commission.

The advantage, in a proceeding covering transactions in eight states, of being able to order the utility to frame and submit new rates, is obvious. But to hold, as contended here, that the rates as a matter of law are Panhandle's subject to the provisions of 717c (d) and not the Commission's controlled by Section 717d (a) (assuming that findings are not necessary as to rate schedules filed by a utility under Section 717c [d]) would enable the Commission by the simple device of ordering a utility to file rate schedules to dispense with the findings essential under the statute. The Commission is authorized not only to modify contractual obliga- [8] tions, but also to impose reasonable conditions as to service. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission, supra,* 647; *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co., supra,* 789. However, express findings must be entered, both with reference to change of rates and to new provisions for conditions of service. *Colorado Interstate Gas Co.* v. *Federal*

Power Commission, 142 Fed. (2d) 943, 954 (C. A. 10); *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 295 U. S. 193; *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U. S. 626, 634. The very flexibility of operation which is afforded in administrative proceedings makes all the more essential a requirement of express findings for the protection of the public and also for informed consideration of these cases coming up for review by the courts.

Panhandle also contends that, if the new schedules of Gd-1 APPLICABLE (c) could not supersede or modify the provisions in the amended contract of August 31, 1935, unless such provisions were specifically found to be unjust, unreasonable, unduly discriminatory, or preferential, the Commission's order of November 2, 1945, supplied such a finding. In that order the Commission specifically found that the rate schedules tendered by Panhandle were in substantial compliance with the order of September 23, 1942. Panhandle argues that this constitutes a finding that these new provisions covering terms and conditions of service as well as rates were just and reasonable and not excessive.

This contention also has no merit. The findings must be express, precise, and clear. The order and findings of November 2, 1945, as well as of September 23, 1942, covered rates and charges but not terms and conditions of service. The two subjects are not identical and they are covered by separate paragraphs of the statute. Section 717c (a) provides that "All rates and charges made, demanded or received . . . shall be just and reasonable. . . ." Section 717d provides that, in case any contract or any practice affecting such rate or charge is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable practice or contract to be thereafter observed. This provision applies to terms and conditions of service. The statute contains no express definition of "rates and charges" but each of the two words bears a dollars and cents connotation. Web-

ster's New International Dictionary, 1955. Section 717c carries out that connotation [9] for it contemplates that the rates and charges in question can be "received." While Gd-1 RATE (a) fixes rates and charges which may be "received," 1.85 or 2.6 as the case may be, Gd-1 APPLICABLE (c) describes nothing that can be received and fixes no rates and charges.

What Panhandle in effect contends is that a paragraph of a rate schedule which fixes no rates and charges but fixes terms and conditions of service, namely, Gd-1 APPLICABLE (c), is validated by an order which relates only to rates and charges. This contention cannot be sustained under the statute and the applicable decisions.

Moreover, during the hearings upon the new rates submitted by Panhandle, including Gd-1 APPLICABLE (c), the Commission at no point indicated that terms of resale by the utility to large industrial consumers were under consideration. In fact, it indicated the contrary, repeatedly stating in various orders that only rates were being considered. Thus, on September 14, 1945, the Commission ordered that the hearing on Panhandle's proposed new schedule "shall be limited to matters relating to proper rates which will comply with the Commission's interim order of September 23, 1942. The Commission reserves all other matters for later consideration." In the order of November 2, 1945, approving the rates in the proposed schedule, the Commission states that the preceding hearing "was limited to matters relative to proper rates. . . ." On August 6, 1946, in an order for a hearing regarding terms and conditions of service the Commission stated:

> "(d) The public hearing held pursuant to the Commission's order of September 14, 1945, was not concerned with matters relating to terms and conditions of service embodied in the rate schedules under consideration. . . ."

The fact, then, that the Commission in its order of November 2, 1945, states that the rates offered by Panhandle

are in substantial compliance with its order of September 23, 1942, does not constitute a finding that provisions or practices concerning terms and conditions of service are included in the rates which had previously been found to be unjust, unduly unreasonable, discriminatory, and preferential nor that new provisions covering terms and conditions of service are determined to be "just and reasonable." Section 717d. Since the order of 1942 did not refer to nor cover terms and conditions [10] of service, the approval of the rates in the order of November 2, 1945, as being in full compliance with the order of 1942 does not cover and validate the provisions as to resale in Gd-1 APPLICABLE (c). Moreover, the lack of essential findings on this point was not cured by the Commission's letter of August 8, 1947. The failure of the Commission in its order of November 2, 1945, to distinguish between rates and charges and terms and conditions of service detracted from the definiteness of that order and lends support to the District Court's conclusion that Consolidated may thereby have been misled and prevented from filing timely application for rehearing and timely appeal from the order of November 2, 1945.

This consideration is not conclusive. The decisive point is that the District Court's holding that Gd-1 APPLICABLE (c) had no legal effect was correct under the statute and the pertinent adjudications. *Colorado-Wyoming Gas Co.* v. *Federal Power Commission, supra,* 634; *Atchison, Topeka & Santa Fe* v. *United States, supra,* 201, 202. As Panhandle's obligation to deliver limited amounts of gas for resale under the new schedules was not based upon the essential statutory findings, the order was not effective to supersede the contractual obligations of the amended agreement of 1935 between Panhandle and Consolidated and Panhandle had no cause of action under Gd-1 APPLICABLE (c). Since Counts I, II, III, and V are all based upon the alleged violation of Gd-1 APPLICABLE (c), the judg-

ment of the District Court on these four counts must be affirmed.

In Count VII Panhandle avers that Consolidated unlawfully inflated the daily "base load" applicable to sales by Panhandle for the period from October 1, 1948, through September 30, 1949, by excluding from its computation of the daily "base load" the days in July, August, and September, 1948, when Panhandle delivered less than 125,000,000 cubic feet per day to Consolidated. The District Court held that these days should be excluded in the "base load" computation upon the ground that the Commission's order expressly provided for such exclusion. This part of the judgment was correct and is affirmed.

On Counts IV and VI the court rendered judgment for Panhandle, denying interest to Panhandle, however, prior to the date of the entry of judgment. This ruling as to interest is in conformity with the amended contract of August 31, 1935, and is correct.

[11] The amounts sued for in these counts are admitted to be due for gas delivered by Panhandle to Consolidated, but were withheld by Consolidated as claimed setoff for Panhandle's deficiencies in deliveries from July 23, 1948, through October 31, 1948, because of which Consolidated says it was compelled to manufacture gas at increased cost in order to supply its customers. The setoff is asserted as a defense to Counts IV and VI. Also an affirmative cause of action based on deficiency deliveries by Panhandle to Consolidated for separate periods from December 19, 1946, to October 31, 1948, is asserted in Consolidated's counterclaim.

Consolidated contends (1) that in view of the contract of August 31, 1935, as amended, particularly Articles X, XV, and XVIII, Panhandle is liable for all shortages below the 125,000,000 cubic feet per day provided in the contract if Panhandle was negligent or failed to use diligence so as to prevent such shortages; (2) that under the Commission's

order of July 17, 1948, if Panhandle made available to its firm customers east of Edgerton less than the delivery capacity of its system east of Edgerton, it violated the Commission's order of July 17, 1948, and is liable under Paragraph 4 of Article XVIII of the contract of August 31, 1935, to reimburse Consolidated for the expense caused by such shortages.

The principal provisions of the amended contract of August 31, 1935, which Consolidated claims were still in force after July 17, 1948, and establish Panhandle's liability for deferred deliveries, are in brief as follows: Under Article X Panhandle agreed to construct pipe lines and to hold or have available gas acreage and production facilities sufficient to supply Consolidated and its other customers with a continuous supply of gas. Under Article XVIII if Panhandle failed to deliver gas in the volume agreed, it was required, with an exception not material here, to reimburse Consolidated for the expense of manufacture or purchase to remedy the deficiency.

The order of July 17, 1948, was entered in various consolidated proceedings, covering transactions in eight states. Among other things it authorized curtailing deliveries by Panhandle to Consolidated and Michigan Gas Storage. In its Opinion 166 filed July 17, 1948, in conformity to which the order of July 17, 1948, was entered, the Commission declared:

> "We find that the practice of Panhandle in permitting Consolidated to take 125,000 Mcf a day, [12] while delivering to Gas Storage something less than the quantity to which it is entitled under its gas purchase contract, has the effect of granting to Consolidated an undue preference and advantage, and subjects Gas Storage to undue prejudice and disadvantage."

The order of July 17, 1948, was based on proper hearings and express findings and, as found by the District Court, was clearly valid in the modification which it imposed upon Panhandle's contractual obligation to deliver

125,000,000 cubic feet of gas per day to Consolidated. The order also freed Consolidated from any restriction as to locality of resale and permitted Panhandle to establish physical controls upon delivery of gas in Detroit. However, the order of July 17, 1948, made no findings as to other provisions of the contract between Panhandle and Consolidated excepting those which relate to the amount, volume, and method of delivery described above. Neither the order nor Opinion 166 in terms modified or considered Sections X, XV, or XVIII of the amended contract of August 31, 1935. In its Opinion 166-A issued August 25, 1948, the Commission declared:

> "The Commission's order of July 17, 1948, which prescribes the manner in which Panhandle shall make deliveries of natural gas to Michigan Consolidated and Michigan Gas Storage Company effectively modifies all provisions of Panhandle's Rate Schedule FPC No. 12, and supplements thereto which may be inconsistent with the provisions of that order including Panhandle's obligation to deliver 125,000 Mcf per day and including Paragraph 4 of Article XVIII of the contract of August 31, 1935 (Panhandle's Rate Schedule FPC No. 12), and Supplement No. 11 to such rate schedule accepted for filing under Commission order of July 23, 1948, likewise modifies any provision in such rate schedule inconsistent therewith."

Since Article XVIII was not mentioned in the findings of the order of July 17, 1948, this interpretation by the Commission made in its Opinion 166-A has no legal effect. *Atchison, Topeka & Santa Fe Railway Co.* v. *United States, supra.* The Commission is not authorized to interpret the legal effect of its own orders or alleged violations thereof [Cf. *Michigan Consolidated Gas Co.* [13] v. *Federal Power Commission,* 167 Fed. (2d) 264 (C. A. D. C.)], nor to extend their legal scope.

The order did effectively supersede Panhandle's contractual obligation to deliver 125,000,000 cubic feet of gas per day during the period described therein, namely, July

17, 1948, to October 31, 1948. The order affected and curtailed the amount of delivery but did not alter liability of Panhandle under Article XVIII of the contract of August 31, 1935, for damages caused by wrongful deficiencies in delivery.

Concerning Consolidated's contention that the shortage of gas delivered to Consolidated was caused by Panhandle's neglect or deliberate failure to provide itself with adequate facilities at the Edgerton Station as required by the contract, we think that the District Court properly declined to assume jurisdiction. The problems involved under these particular allegations in Consolidated's answer and counterclaim involved, as the District Court observed, "intricate problems of service as between different users and different geographical sections" and required for their decision the technical understanding and expert knowledge of the Commission. The transactions covered by certain of the Commission's orders included in the record and directly relevant involve eight states and great metropolitan areas. The problems of changing industrial conditions and growing needs for natural gas both territorially and otherwise are so extensive they do not lend themselves in the first instance to hearing before a court and require the expertise of the Commission. We think this is true, although this case presents actions for damages and not an action for specific performance as in *Michigan Consolidated Gas Company* v. *Panhandle Eastern Pipe Line Company, supra.*

However, we differ from the District Court's conclusion that Consolidated has no defense to Counts IV and VI and no cause of action under the Commission's order of July 17, 1948, and that the District Court has no jurisdiction of that question.

Consideration as to whether Panhandle has not complied with the order of the Commission and has breached the provision for reimbursement embodied in Article XVIII

of the contract of August 31, 1935, presents the usual questions of law and fact which a court is authorized to handle and which require no special expert knowledge. The exercise of the administrative power and discretion of the Commission is in no way involved. Cf. *Pennsylvania Railroad Company* v. *Puritan Coal* [14] *Mining Company*, 237 U. S. 121; *Great Northern Railway Company* v. *Merchants Elevator Company*, 259 U. S. 285. Moreover, a determination of these questions by the court could result in no undue preference as the Commission in its order of July 17, 1948, has fixed the priorities to be followed.

Under the order of July 17, 1948, construed with Article XVIII of the contract of August 31, 1935, still in force during the period involved, Consolidated has a valid cause of action against Panhandle. The deficiencies in delivery are admitted and the asserted liability of Panhandle for reimbursement of expenses of manufacture exists if the order of July 17, 1948, was violated by Panhandle.

This order required Panhandle to make deliveries to Consolidated at Detroit and to Michigan Gas Storage, both of which were firm customers, entitled to uninterrupted deliveries for the emergency period of "such volumes of natural gas as may be available after making deliveries to all of its other customers east of its Edgerton Compressor Station" in certain percentages not here material. Panhandle claims that since it made deliveries in the specific percentages to Consolidated and Gas Storage it complied with the order and Consolidated conceded at the trial that the percentages were followed in the deliveries. This order was in conformity with FPC Opinion No. 166 issued July 17, 1948, in which the Commission stated, "since the station capacity is based upon estimates similar to those which have frequently in the past proved substantially below performance, we are unwilling to make a finding with respect to the availability east of Edgerton Station of specific volumes of gas. Rather we believe that Panhandle will exert every reasonable effort to deliver through

that station the largest volumes of gas possible; and we shall expect that, if necessary to do so, and to the extent required, Panhandle will make appropriate curtailment of interruptible deliveries pursuant to the provisions of effective tariffs and contracts."

We construe the order as granting to Consolidated and Michigan Gas Storage priorities over interrupticle customers west of Edgerton in the volume of gas to be delivered by Panhandle at Edgerton up to the capacity of that station. It follows that, if Panhandle failed to deliver to Consolidated and Gas Storage in the percentages established and up to the capacity of Edgerton Station such volumes of natural gas as were available after making deliveries to Panhandle's other customers [15] east of Edgerton Station, Panhandle is liable under Article XVIII of the contract of August 31, 1935, to reimburse Consolidated for such deficiencies. The withholding of amounts adequate for reimbursement, if the right to reimbursement is established, is expressly authorized by the contract and constitutes a valid defense to Counts IV and VI.

Consolidated also asserts a cause of action in its counterclaim for additional amounts which it claims to have expended due to the deficient deliveries of Panhandle during this period from December 19, 1946, to October 31, 1948. The deficiencies arising in 1946 and 1947 were under the emergency orders in force during these years, which specified definite standards of curtailment in delivery.

The District Court held that it had no jurisdiction to consider this question. For the reasons stated above we think this was error.

Having ruled that it had no jurisdiction to decide Consolidated's claim of setoff and of affirmative recovery under the counterclaim the District Court denied two motions for discovery led by Consolidated. The court thus refused to permit Consolidated, among other things, to prove the capacity of the Edgerton Station and to prove how much

interruptible gas was delivered west of Edgerton by Panhandle during the emergency period out of the volume which was properly available at the Edgerton Station. Panhandle's records showed that the deliveries of the Edgerton Station often exceeded 285,000,000 cubic feet per day. The Commission in its Opinion 166 stated that 270,000,000 cubic feet of gas per day was not the capacity of Edgerton and that a substantially larger volume of gas could be delivered through that compressor station. This conclusion is amply sustained by the record. On May 31, 1948, 296,000,000 cubic feet were delivered through Edgerton. This "abnormal" delivery was ascribed by Panhandle's witness "to the reduction of takes of gas by industrial customers served west of Edgerton." On 21 out of 100 days covered by the emergency order Panhandle delivered more than 285,000,000 cubic feet, and on some days exceeded 290,000,000 cubic feet. However, in October, 1948, for a number of days the deliveries fell below 270,000,000 cubic feet per day. These figures are taken from Panhandle's records. They support Consolidated's contention that Edgerton had a capacity much over 270,000,000 cubic feet per day and that Panhandle did not on the days listed comply with the Commission's order.

[16] Panhandle contended that Consolidated's motions for discovery upon these questions should be refused because they were not relevant. If we are correct in our conclusion that under the Commission's order of July 17, 1948, firm customers of Panhandle east of Edgerton had a priority over interruptible customers of Panhandle west of Edgerton to the extent of Edgerton's total capacity, then Panhandle's record of interruptible deliveries west of Edgerton for the period involved was directly relevant. The issue was whether Panhandle complied with the order of July 17, 1948. Upon that point the question whether the deficiency was caused or contributed to by Panhandle's diversion of millions of cubic feet of gas per day west of Edgerton to interruptible customers was relevant. As the

District Court had jurisdiction of Consolidated's defense stated in Counts IV and VI, judgment as to these counts must be reversed. For the same reason judgment must be reversed as to the counterclaim. The case must be remanded for new trial on Counts IV and VI and the counterclaim, with direction to consider the actions and defenses pleaded and to consider the motions for discovery and make such order thereunder as is proper in accordance with Rule 34 of the Federal Rules of Civil Procedure.

The judgment is affirmed as to Counts I, II, III, V and VII and reversed as to Counts IV and VI and as to the counterclaim.

The case is remanded to the District Court for further proceedings in accordance with this opinion.

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[17]

Causes Argued and Submitted

February 4, 1955—Before: Allen, Miller and Stewart, Circuit Judges.

These causes are argued by Walter M. Meek for Michigan Consolidated and by Henry C. Bogle for Panhandle Eastern and are submitted to the court.

Judgment

Case No. 12,200

(Filed August 1, 1955)

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby

affirmed as to Counts I, II, III, V, and VII and reversed as to Counts IV and VI and as to the counterclaim.

The case is remanded to the District Court for further proceedings in accordance with the opinion herein.

Judgment

Case No. 12,201

(Filed August 1, 1955)

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was [18] argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed as to Counts I, II, III, V, and VII and reversed as to Counts IV and VI and as to the counterclaim.

The case is remanded to the District Court for further proceedings in accordance with the opinion herein.

[19]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michigan Consolidated Gas Company, No. 12200, Appellant,

v.

Panhandle Eastern Pipe Line Company, Appellee.

Panhandle Eastern Pipe Line Company, Appellant,

v.

Michigan Consolidated Gas Company, No. 12201, Appellee.

Before ALLEN, MILLER, and STEWART, Circuit Judges.

ORDER

Filed October 6, 1955

The petition for submission of the petition for rehearing to the entire bench is denied.

The opinion is modified by striking therefrom sentence No. 2 in paragraph No. 3 of page 10 and vy substituting therefor the following sentence:

> The District Court held that these days should be excluded in the "base load' computation upon the ground that the Commission's order of November 2, 1945, which approved and adopted RATE SCHEDULE Gd-1, provided for such exclusion.

The petition for rehearing is denied.

Approved for entry:

.....

United States Circuit Judge

[20]

Nos. 12200, 12001

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michigan Consolidated Gas Company, No. 12200, Appellant,

v.

Panhandle Eastern Pipe Line Company, Appellee.

Panhandle Eastern Pipe Line Company, Appellant,

v.

Michigan Consolidated Gas Company, No. 12201, Appellee.
Before ALLEN, MILLER, and STEWART, Circuit Judges.

MEMORANDUM ON PETITION FOR REHEARING

Filed October 6, 1955

ALLEN, Circuit Judge. The application for submission of the petition for rehearing to the entire bench is denied. We recently held "that in cases where the appeal was heard, and the judgment or order complained of was decided, by a regular Court consisting of three judges only, a petition to rehear or to consider should not be considered by the Court en banc." *N.L.R.B.* v. *Cambria Clay Products Co.*, 12072, order entered August 12, 1955; *Northwest Air Lines, Inc., et al.* v. *Glenn L. Martin Co.*, 12130, order entered October 3, 1955.

[21] In the petition for rehearing filed by Panhandle many contentions advanced by Panhandle at the hearing are reiterated. Each of these contentions was given ex-

tensive consideration and they will not be discussed here. We adhere to our position that Section 5 of the Natural Gas Act, 15 U.S.C. § 717d(a), governs these proceedings and that in the absence of the findings required under that paragraph Gd-1 APPLICABLE (c) has no force or effect. This disposes in this court of Counts I, II, III, and V of Panhandle's complaint, and subsidiary questions as to these Counts need not be debated. Neither *Mobile Gas Service Corporation* v. *Federal Power Commission,* 215 Fed. (2d) 883 (C. A. 3), nor *Tyler Gas Service Company* v. *United Gas Pipe Line Company,* 217 Fed. (2d) 73 (C. A. 5), involves our precise question and they have no direct bearing.

With reference to Counts IV and VI Panhandle again contends that it is not liable. It says that it was entitled under the Commission's order of July 17, 1948, to decide in its discretion how much gas it would distribute to Gas Storage and Consolidated. It adheres to the position stated in its main brief at the hearing that, after it had delivered to The Ohio Fuel Gas Company, to East Ohio Gas Company, and to its customers east of Edgerton other than Consolidated and Gas Storage the various amounts required by the order, when it divided the balance of gas passing through Edgerton station between Consolidated and Gas Storage in the proper percentages, it had complied with its obligations under the order of July 17, 1948. Panhandle did not say at the hearing, it does not now say in the petition for rehearing, that it delivered gas up to the physical capacity of the Edgerton station. It relies on the [22] fact that the Commission refused an application of the Michigan Public Service Commission to include in its order of July 17, 1948, a provision specifically discontinuing deliveries to Panhandle's interruptible customers. However, the Commission in Opinion 166, which accompanied and laid the basis for the orders of even date therewith, namely, July 17, 1948,

declared that the contracts between Panhandle and Gas Storage and between Panhandle and Consolidated were firm contracts and assumed that in its operation Panhandle would give to the deliveries under such firm contracts "the degree of priority appropriate thereto * * *." (Opinion 166, 216a). It found that "during the present storage season Panhandle's delivery capacity on its system east of Edgerton, after deliveries to its other customers in that area, should then be made available to Consolidated and Gas Storage" in the percentages previously quoted in the opinion. (Opinion 166, 206a). It stated that "a dominant, if not controlling, factor with respect to the supply of gas available from Panhandle's system east of the Edgerton station is the physical capacity of that compressor station." (Opinion 166, 216a). We are cited to no statement of the Commission which indicates that Panhandle was given a discretion as to how much gas should pass through Edgerton. While the Commission did not determine the physical capacity of Edgerton, it found that it was greater than Panhandle's witness testified. The amounts to be delivered were not definite but the measurement was definite. It was to be up to the physical capacity of the station. In light of all the discussion bearing on this point in Opinion 166, we construe the phrase "physical capacity" as meaning the full capacity of the station.

[23] The decision of the Southern District Court of Illinois in *Federal Power Commission* v. *Illinois Power Company and Illinois Commerce Commission,* entered October 18, 1948, does not affect our conclusion. While the court stated that Panhandle in its discretion should determine initially when curtailments in interruptible service should be made and the manner and extent thereof, this finding was qualified by the holding that this was "subject to the provisions of the Natural Gas Act and the rules, regulations and orders of the Commission" issued thereunder. (278a, paragraph 15).

Panhandle objects to the opinion because it states as to Counts IV and VI that the deficiencies sued for are "admitted." This statement is correct. Panhandle does not assert that it delivered up to the full capacity of Edgerton station as was ordered by the Commission July 17, 1948. Since the order was to deliver to the full capacity of the station and Panhandle's own records show that this was not done, the deficiencies are admitted.

No evidence of damage was introduced by Consolidated under the counterclaim because it had been dismissed at the time of trial. Panhandle's contention that the reversal of judgment as to the counterclaim is incorrect because the gas claimed to have been manufactured was manufactured after the period of deficiency deliveries had ended, has no merit. Under the Commission's Opinion 16C Consolidated was specifically authorized to receive and store gas for winter requirements. (201a). The gas received and stored, if insufficient to meet demands of the winter, could be compensated for under Paragraph 4 of Article XVIII of the contract.

The petition for rehearing is denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 606

PANHANDLE EASTERN PIPE LINE COMPANY,
Petitioner,
vs.
MICHIGAN CONSOLIDATED GAS COMPANY,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Michigan Consolidated Gas Company (hereinafter referred to as "Consolidated") respectfully prays that the petition for a writ of certiorari filed by Panhandle Eastern Pipe Line Company (hereinafter referred to as "Panhandle") be denied. As Panhandle itself asserts (Pet. 5)[1], the decision of the court below in reality involves two separate and distinct cases. Although Panhandle claims

[1] References to Panhandle's petition will be designated "(Pet. —)", and references to the joint appendix in the court below will be designated "(R. —)". An asterisk appearing after the record reference indicates the exhibit was not printed but is identified therein and has been filed as a part of the record. Emphasis is supplied throughout.

that each case presents significant questions requiring further review by this Court, we shall show that Panhandle's petition presents nothing more than an effort further to prolong controversies that have been in litigation for nearly a decade, that they have had the full and deliberate consideration of an appellate court uniquely qualified to decide them and that the questions present no issues which justify the further review of this Court.

Because the two controversies are distinct from one another, separate statements of the facts and questions presented will be made.

FIRST CASE

QUESTION PRESENTED

In response to an order of the Federal Power Commission directing a natural gas pipeline company to reduce its rates, that company filed a new rate schedule containing, in addition to a reduced level of rates, a provision designed to effect a substantial change in certain terms and conditions of service. After a hearing devoted solely to the question whether the proposed rates complied with the Commission's rate reduction order, the Commission entered a further order approving the newly filed rates. The Court of Appeals, in affirming the judgment of the district court, unanimously concluded that the Commission's order did not purport to include and did not in fact approve the change in terms and conditions of service and that therefore such change never became effective.

The question presented is whether this conclusion of the Court of Appeals was clearly erroneous.

STATEMENT OF FACTS

In 1935 Panhandle, an interstate natural gas pipeline company, entered into a contract with Consolidated, a utility company supplying gas to Detroit and surrounding areas, to supply the latter with its requirements of gas up to a maximum of 120,000 Mcf per day (R. 19a-59a). This contract was for firm gas as distinguished from interruptible gas and contained no terms or conditions whatever regarding the resale of the gas by Consolidated to its own customers.

In 1937 Congress enacted the Natural Gas Act, 15 U. S. C., Sec. 717 *et seq.*, authorizing the Commission to regulate the interstate transportation and sale of natural gas for resale, thus bringing Panhandle's sales to Consolidated under Commission jurisdiction. Pursuant to the requirements of Section 4(c) of the Act, Panhandle filed its contract with Consolidated and supplements thereto as an initial rate schedule.[2] Under the terms of the Act, this contract continued to govern the rights and obligations of the parties except to the extent modified by the Commission in accordance with law and the procedures specified in the Act.

In 1942, after lengthy hearings, the Commission determined that the rates charged by Panhandle to its utility customers, including Consolidated, under existing contracts were unreasonably high and ordered Panhandle to submit proposed new rates reducing its annual gross income by a specified amount (R. 1129a-1135a). The hearing and the resulting order of the Commission related

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[2] This contract was designated as Panhandle's Rate Schedule FPC No. 12.

solely to the level of Panhandle's rates and not to any other terms of the contract (R. 1129a-1135a).

After several years of litigation this Court affirmed the order of the Commission.[3] Thereafter, in response to the order, Panhandle submitted two new proposed schedules reducing its rates, one covering firm gas (Gd-1) and the other covering interruptible gas (Rd-2) (R. 61a-66a).[4] Schedule Gd-1 introduced two new elements into the rate schedule: (1) the "base load" method of fixing rates, and (2) a condition designed to effectually prohibit resale of firm gas by the purchasing utility to new customers of the utility using gas in excess of 1,200,000 therms annually (R. 61a, 62a). These two new provisions were unrelated and had entirely different purposes.

The base load method of pricing gas consisted of determining the average daily purchases of firm gas by the utility during the months of June through September. This daily average became the utility's "base load" beginning October 1 and continuing for one year. Firm gas purchased during each of the months in the yearly billing period up to the amount of the base load was billed at 1.85 cents per therm, while all gas in excess of that amount was billed at the rate of 2.6 cents per therm (R. 62a). This method of pricing was adopted by Panhandle to encourage its utility customers to make larger purchases of gas dur-

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[3] *Panhandle Eastern Pipe Line Company v. Federal Power Commission*, 324 U. S. 635.

[4] Schedule Rd-2 fixed a rate for all interruptible gas sold to a utility for resale to consumers. Panhandle undertook to sell such interruptible gas only when "in its judgment" it had "a sufficient supply of gas and adequate facilities with which to make such deliveries" (R. 66a). Consolidated made nine applications to Panhandle for such gas during November and December, 1945 but was continually refused (R. 1259a-1275a).

ing the summer months when the pipeline was not operating at capacity, thus improving its load factor (R. 1316a). By increasing its purchases during the "base load" period, the utility was of course enabled to buy more gas at the lower rate during the ensuing year.

The other new provision proposed by Panhandle was quite different. Prior to 1942, Panhandle's rates were so high as to seriously limit resales by utilities for industrial uses. When its rates were ordered reduced, and such sales became feasible, Panhandle desired to prevent its utility customers from taking on new industrial customers (R. 594), since Panhandle had by then initiated a program of by-passing the utilities and making direct sales to industries.[5] Accordingly, Panhandle included in its proposed schedule a provision that would have prevented a utility from purchasing any firm gas for resale to new large industrial consumers. This provision, as finally amended, read as follows:

> "(c) This rate schedule shall not apply to gas purchased by the Utility from the Company for resale to any individual customer whose present, or estimated, annual use of gas exceeds one million two hundred thousand (1,200,000) therms, unless such gas requirements were purchased by the Utility from the Company on a firm basis prior to October 1, 1945" (R. 61a).

Inasmuch as Schedule Gd-1 containing this provision was the only schedule proposed by Panhandle under which

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[5] Panhandle's direct sale program was condemned by this Court in *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U. S. 507, 509-10, and again in *Panhandle Eastern Pipe Line Company v. Michigan Public Service Commission*, 341 U. S. 329, where the Court said: "Appellant asserts the right to compete for the cream of the volume business without regard to the local public convenience or necessity." 341 U. S. at 334.

firm gas could be purchased, the effect of this provision was to destroy Consolidated's unquestioned contract right to sell 125,000,000 cubic feet of gas per day to such customers and under such circumstances as it chose and to give Panhandle an absolute veto on the sale of any gas to new industrial customers.

On September 14, 1945, the Commission issued an order setting hearings on Panhandle's proposed new rate schedule but specifically limited the scope of the hearing by the following provision of its order:

> "Such hearings shall be limited to matters relating to proper rates which will comply with the Commission's interim order of September 23, 1942. *The Commission reserves all other matters for later consideration*" (R. 1142a).

Panhandle introduced evidence at the hearings to support its proposed level of rates and to justify its "base load" rate proposal but introduced no evidence whatever regarding the proposed prohibition of sales by utilities to new industrial customers, since that provision involved terms and conditions of service rather than rates.

Following these hearings, the Commission issued an order on November 2, 1945 (R. 965a-975a) approving the rates in Panhandle's proposed schedules, the order expressly reciting that the preceding hearing "was limited to matters relative to proper rates." In accordance with its reservation of all other matters for later consideration, the Commission subsequently ordered a hearing regarding the terms and conditions of service in Panhandle's proposed rate schedules (R. 1114a-1146a).[6] However, be-

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[6] In that order the Commission once again stated: "The public hearing held pursuant to the Commission's order of September 14, 1945, *was not concerned with matters relating to terms and conditions of service embodied in the rate schedules under consideration,* * * *" (R. 1145a).

cause of the necessity of prescribing emergency rules and regulations dealing with shortages of gas on Panhandle's system, the subsequent hearings were confined almost entirely to that subject and resulted in orders relating solely to allocations of gas for the winter seasons of 1946-47 and 1947-48 (R. 70a-73a, 92a-99a). The result was that the Commission never entered any order with respect to such terms and conditions of service (R. 578a, 579a).

For nearly two years thereafter, Consolidated served its industrial customers with gas without any suggestion on Panhandle's part that Consolidated was violating any provision of Panhandle's tariff. However, in 1947, Panhandle claimed for the first time that its tariff provision Gd-1 Applicable (c) was effective and applicable to such sales (R. 1221a-1248a) and in July, 1948, brought the instant action claiming damages on account of the alleged violation of that provision. Panhandle's theory of damages was that, if Consolidated's purchases for sale to new industrial consumers were invalid, such purchases during the "base load" period should be excluded in calculating the base load for the ensuing yearly period (R. 9a-14a). Panhandle therefore asked judgment for the increased cost of such gas to Consolidated resulting from a recalculation of the base load with the allegedly invalid purchases excluded (R. 6a-15a, 142a, 322a).

Both the District Court and the Court of Appeals rejected Panhandle's contention that the Commission's order of November 2, 1945 had approved the provision in Panhandle's rate schedule prohibiting purchases of gas for resale to large new industrial customers (Gd-1 Applicable (c)). Both courts pointed out that the hearings preceding that order, and the order itself, were expressly limited to the propriety of the new *rates* filed by Panhandle and did not relate to the new *condition of service* that would have

prohibited sales to new industrial consumers. In this connection the Court of Appeals stated:

> "What Panhandle in effect contends is that a paragraph of a rate schedule which fixes no rates and charges but fixes terms and conditions of service, namely, Gd-1 APPLICABLE (c), is validated by an order which relates only to rates and charges. This contention cannot be sustained under the statute and applicable decisions." (Pet. App. 11a.)

Panhandle's petition for certiorari in essence asks this Court to review the decision by two courts below that the Commission's order of November 2, 1945 did not, in approving Panhandle's proposed rates, also approve a condition of service which clearly was excluded from consideration in the proceedings leading to the order and which would have destroyed a valuable existing contract right of Consolidated and prohibited the purchase by it of any firm gas for sale to new large industrial customers.

ARGUMENT

1. Panhandle's principal argument is that the decision of the courts below that the Commission's order of November 2, 1945 did not approve the condition contained in Gd-1 Applicable (c) of its proposed rate schedule constitutes a "collateral attack" on that order. (Pet. 2, 13-18). The cases said to be in conflict with the decision below all held that orders of administrative agencies may not be attacked collaterally; that direct review of an order must be sought if it is to be set aside. The courts below were perfectly aware of these principles.

It is quite a different thing to contend, however, that a court may not in subsequent proceedings construe the agency's order, if that question becomes material. Courts construe agency orders every day. It is hardly a "collateral attack" upon an order to determine that it covered one subject and not another; that it approved one part of a proposal and reserved another part for later consideration. The order is not thereby set aside or invalidated; on the contrary, it is construed and applied.

Panhandle's principal reliance seems to be on the fact that, nearly two years after the order of November 2, 1945 was issued, the Commission wrote a letter (R. 1027a-1029a) and issued an order (R. 1030a) taking the position that the prohibition of sales to new industrial customers in Panhandle's rate schedule (*i.e.*, paragraph (c)) was in effect and applicable. Panhandle apparently contends that because the Commission, two years after issuance of its order of November 2, 1945, took the position that it had there approved the condition of Panhandle's tariff prohibiting purchases for resale to new industrial customers,

the conclusion of the courts below to the contrary amounts to a collateral attack.

An agency's later statement of what it then considered an earlier order was intended to cover is a consideration to be weighed by the court in construing that order. But Panhandle's contention that the agency's *nunc pro tunc* determination is conclusive and binding upon the courts, whatever the evidence to the contrary, is startling indeed.

Panhandle makes much of the fact that Consolidated attempted to appeal the order of November 2, 1945 when the Commission two years later "interpreted" the order as having approved paragraph (c) of Panhandle's proposed rate schedule, and that the appeal was dismissed as untimely (Pet. 16). But this fact merely emphasizes the inherent fallacy of Panhandle's contention. For if an agency can issue a statement interpreting a prior order long after the appeal period has run, so that no direct appeal of the order as thus "interpreted" may be taken, and a court may not later inquire whether the Commission's subsequent interpretation is justified, the result is that judicial review is completely frustrated. Indeed, any such contention would squarely contravene the holding of the Court of Appeals for the District of Columbia dismissing Consolidated's appeal. *Michigan Consolidated Gas Co. v. Federal Power Commission,* 167 F. 2d 264. For there, in concluding that the Commission's later interpretive statement was not itself a reviewable order, the court pointed out that the meaning of the 1945 order, and whether Consolidated violated it, are questions that may properly be considered by the district court in proceedings directly involving those questions.

Thus, the issue before the courts below, and the issue that would be presented to this court if certiorari were granted, is a narrow and, in the main, factual question, namely, whether the Commission's order of November 2, 1945 approving Panhandle's proposed rates also constituted approval of its proposed condition prohibiting sales to new industrial customers. Since this is so obviously a question without general significance, the circumstances justifying the conclusion of the courts below will be only briefly stated:

(a) In its order setting a hearing on Panhandle's proposed rate schedules, the Commission specifically stated:

> "Such hearing shall be limited to matters relating to proper rates which will comply with the Commission's interim order of September 23, 1942. *The Commission reserves all other matters for later consideration*" (R. 1142a).

As the court below pointed out (Pet. App. 10a), there is a well-recognized distinction between "rates and charges", on the one hand, and "terms and conditions of service" on the other. Rates and charges are "dollars and cents" provisions. Terms and conditions of service have to do with amounts, uses, etc. Thus, when the Commission set a hearing on Panhandle's proposed rates, reserving other matters for later consideration, it was stating in plain English that conditions such as the prohibition of resales to industrial consumers were not within the scope of the proceeding.

Panhandle refers to the distinction between rates and charges and terms and conditions of service as a "hypertechnical distinction" and argues that, since the prohibition of resales to industry was a part of the *rate structure*, it must have been within the scope of the proceedings and

the Commission's order (Pet. 23). But if that were true, it is difficult to understand what matters the Commission reserved for later consideration. If the entire rate structure was encompassed by the hearings and order, the Commission's hearing order restricting the scope of the issues to "matters relating to proper rates" and reserving other matters for later consideration simply has no meaning.[7]

(b) In the order of November 2, 1945 approving Panhandle's new rates, the Commission again stated that the hearing "was limited to matters relating to proper rates which would comply with the Commission's interim order of September 23, 1942" (R. 968a). For the reasons already stated, this constitutes clear recognition that the condition prohibiting resales to industrial customers had not been considered and was not being decided.

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[7] Panhandle lays some stress on the fact that counsel for certain intervenors asked questions of Panhandle's witnesses about paragraph Gd-1 Applicable (c). (Pet. 10-11.) Panhandle fails to state that it introduced no evidence whatever in support of that provision, and that its counsel and witnesses stated categorically that the only changes in existing contracts then being proposed had to do with the rates (R. 614a, 617a, 620a, 621a, 623a) and that there were no other matters under consideration. Mr. Yost (Panhandle's counsel) at that hearing stated (R. 780a):

> "'Mr. Yost: As to the question of limitation on supply, Mr. Newton raised that point. I think that that is purely a question for consideration by the Commission when it is raised. These rate schedules preserve in effect the situation as it is and as it was. Some of these distributors have contracts which they negotiated themselves, which contained a limitation. Those contracts still prevail. Those who have no limitation are in no worse position and no better position, because of the terms of these revised schedules that are proposed here. I don't think that is even the issue in this hearing.'"

Moreover, the order for hearing defines the issues, not the sometimes irrelevant questions that may be asked. *Morgan v. United States*, 304 U. S. 1; *W. R. Grace & Co. v. Civil Aeronautics Board et al.*, 154 F. 2d 271, certiorari dismissed 332 U. S. 827.

(c) On August 6, 1946, the Commission issued an order setting a hearing on the matters reserved by the previous orders of September 14 and November 2, 1945, stating that the previous hearing "was not concerned with matters relating to terms and conditions of service embodied in the rate schedules under consideration" (R. 1145a). The "hypertechnical distinction" about which Panhandle complains (Pet. 23) was thus the distinction drawn by the Commission itself in dividing the issues for hearing and consideration. This hearing, as was stated, was started but never concluded.

(d) At the hearing just referred to, counsel for the Commission presented a "summary of special contract provisions superseded by rate filings accepted by order dated November 2, 1945" (R. 1163a). In this summary the *only* provisions in Consolidated's contract affected by the order were the rate provisions.

It was in the light of these circumstances, among others, that the courts below refused to construe the order of November 2, 1945 as having approved paragraph Gd-1 Applicable (c) in spite of the Commission's later interpretive statement (R. 1030a-1031a). The probable explanation of why the Commission took this position in 1947 is disclosed by the injunction suit filed by it in the United States District Court in Detroit in August of that year (R. 88a-91a, 1256a*). It is apparent that the Commission by that time had become exercised over a critical shortage of gas confronting Michigan during the ensuing winter due largely to Panhandle's failure to install additional equipment previously authorized and its continued direct sales to large industrial customers. To meet this condition the Commission desired the maximum amount of gas be placed in underground storage that summer so that it would be

available to supplement Panhandle's daily deliveries during the ensuing winter (R. 88a-91a, 1256a*). With this background the Commission was peculiarly receptive to Panhandle's contentions set forth in its letters (R. 1222a-1224a, 1229a-1233a, 1246a-1248a) that the resales by Consolidated to industrial customers were a violation of the schedule. No hearing was held by the Commission prior to the entry of its interpretation, the Commission purporting to act "upon consideration of data and information in the official files of the Commission", the nature of which was not disclosed (R. 1030a-1031a). To say, as Panhandle must, that such an *ex post facto* interpretation is binding upon the courts despite the language of the order and other evidence to the contrary is to make effective judicial review of administrative action impossible.

2. Panhandle also attempts to argue that the conclusion of the courts below that the Commission's order of November 2, 1945 did not contain requisite findings to support paragraph Gd-1 Applicable (c) presents a question for review by this Court. The court below held that, inasmuch as Panhandle's proposal to prohibit resales by Consolidated to new industrial consumers constituted a change in Panhandle's contract with Consolidated, the order of November 2, 1945, if it had actually approved that proposal, should have contained findings under Section 5(a) of the Act that the terms of the existing contract were unjust, unreasonable, unduly discriminatory or preferential (Pet. App. 8a). Panhandle asserts that this conclusion involves issues now before this Court in other cases* and raises important problems of administration of the Natural Gas Act.

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* Nos. 17, 31, 51 and 53, October Term, 1955, *United Gas Pipe Line Co. v. Mobile Gas Service Corp. et al.* and connected cases.

The questions Panhandle seeks to raise simply are not here. If, as the courts below concluded, the Commission's order of November 2, 1945 was not intended to and did not pass upon or approve Panhandle's proposed prohibition of resales to new consumers, there was no occasion for the Commission to make any findings with respect to that proposal. Panhandle is thus, in reality, asking this Court to decide whether certain findings must be made with respect to an issue which the courts below decided was not even covered by the order involved.

That, indeed, was the point of the court's remarks about the adequacy of the Commission's findings. The court simply pointed out that the Commission had not made the findings that would have been required had it intended to approve that provision, and that to construe the order of November 2, 1945 as contended by Panhandle would have made it void for lack of adequate findings. Since the courts below concluded that the Commission's order did not and was not intended to approve Panhandle's industrial resale proposal, however, the Commission's failure to make any findings with respect thereto was, of course, understandable and proper.

In short, Panhandle here seeks review of a holding that, if a particular issue had been decided by the Commission, certain findings would have been required, despite the fact that the courts below correctly held that that issue had not been considered or decided by the Commission in its order. Unless this Court were to reverse the conclusion of two lower courts that the order of November 2, 1945 did not approve paragraph Gd-1 Applicable (c), it would not even reach the question of what findings are necessary to support such an order.

Panhandle finally asserts (Pet. 24) that the rate schedule provided "in effect" that the base load would not include any purchases for resale to new industrial customers, and "if gas was so taken on a firm, rather than an interruptible basis, the rate would be 2.6¢ per therm." Upon this premise, Panhandle then states that paragraph Gd-1 Applicable (c) is a "rate classification."

These statements are simply erroneous on the facts. As has been pointed out, paragraph (c) attempted completely to prohibit purchases of firm gas for resale to industrial customers and did not refer or relate directly or indirectly to computation of base load rates. The Court of Appeals did not discuss the question, since it concluded that paragraph (c) was ineffective in any event. However, the district court rejected Panhandle's contention on the ground that it would in effect require establishment of an entire new category of rates never presented to or passed upon by the Commission (R. 1320a-1321a). Therefore, when Panhandle now boldly states that the rate schedule "in effect" provides for exclusion of the allegedly prohibited resales from the base load, it is asking this Court to *assume* the contrary of the district court's conclusion on this question.

Stripped of all irrelevancies and generalizations, therefore, Panhandle's petition for certiorari in the First Case simply asks this Court to construe anew an order of the Federal Power Commission in the light of the evidence in a long and complicated record, despite the fact that two courts have already completed that chore with identical results. The question at best is one of very narrow applicability. The order involved applied only to the operations of one pipe line company for a limited period of time, since the "base-load" type of rate was abandoned by Pan-

handle on February 2, 1952, when it put in effect a "demand-commodity" type of rate. The rulings of the lower courts could only constitute precedents in similar cases brought by Panhandle against other utility customers of its line. We know of no such litigation. Consequently, Panhandle here seeks review of a determination—the scope of which is confined to this particular dispute between these particular parties. The petition should be denied.

SECOND CASE

QUESTIONS PRESENTED

A contract between a natural gas company, as seller, and a utility, as buyer, required seller to deliver buyer's requirements of natural gas up to 125,000 Mcf per day and made seller liable for buyer's damages if deficiencies in deliveries were due to seller's fault. Deliveries less than those required by the contract were made under orders of the Federal Power Commission allocating seller's deliveries among its customers during certain periods when seller was unable, through lack of facilities, to make full contract deliveries to all of its customers. The questions presented are:

1. Whether the court below properly construed the allocation order as requiring the seller to deliver to buyer the full amounts that could be delivered through its existing facilities and accordingly determined that the buyer was entitled to damages from seller resulting from its failure or refusal to make full utilization of its existing facilities.

2. Whether a petitioner may raise the defense of *res judicata* for the first time in this Court after having failed to plead or argue the defense in the courts below; if so, whether a prior decision that a party cannot obtain specific performance of a contract because the relief requested was within the exclusive jurisdiction of an administrative agency bars the party's subsequent action for damages on principles of *res judicata.*

3. Whether the determination as to whether or not the seller fully utilized its existing facilities is within the exclusive jurisdiction of the Federal Power Commission and, for that reason, beyond the competence of the courts.

STATEMENT OF FACTS

Under the contract entered into between Panhandle and Consolidated in 1935 (*supra,* p. 3), Panhandle agreed to furnish Consolidated's requirements of gas up to 125,000 Mcf per day (R. 19a-59a). The contract also obligated Panhandle to operate its pipe line "in such a manner as to assure, as nearly as is reasonably possible, a continuous supply of gas in the quantity and of the quality required by this agreement" (R. 32a), and in case of deficient deliveries Panhandle was obligated to "reimburse buyer for any loss which it may sustain by reason of such failure, *including the cost of putting into operation any gas manufacturing equipment * * * to remedy such deficiency*" (R. 39a).

More than ten years after entering into this contract with Consolidated, Panhandle and Consumers Power Company organized a joint subsidiary, Michigan Gas Storage Company, which Panhandle then contracted to supply with 100,000 Mcf of gas per day, despite the fact that its com-

pressor station at Edgerton, Indiana, was inadequate to deliver this quantity of gas in addition to the requirements of its other customers east of Edgerton, including Consolidated (R. 191a-193a). The Commission approved deliveries to Michigan Gas Storage upon Panhandle's representation that it intended to construct additional facilities at Edgerton that would enable it to fulfill all of its contract commitments (R. 194a).

For some reason that does not appear of record, Panhandle never constructed the additional facilities at Edgerton but nevertheless undertook deliveries to its joint subsidiary, Michigan Gas Storage (R. 190a, 205a, 1175a-76a). As a result, by the spring of 1948 a serious gas shortage had developed among Panhandle's customers in Ohio and Michigan (R. 172a-175a, 228a). At a hearing called by the Commission to consider this situation, it developed that the maximum daily demand by Panhandle's customers east of Edgerton other than Consolidated and Michigan Gas Storage totaled 75,000 Mcf per day, and that the daily requirements of these two customers totaled about 225,000 Mcf per day (R. 190a). Panhandle claimed that the physical capacity of its Edgerton station was "from 265,000 to 270,000 Mcf per day on the average" (R. 191a), but its own evidence showed a maximum daily delivery of 296,000 Mcf and an average of 283,000 Mcf (R. 1277a-1280a).

In its Opinion No. 166, the Commission pointed out that the evidence clearly indicated a station capacity greater than 270,000 Mcf per day and specifically refused to find that this was the maximum capacity of the Edgerton station (R. 191a). It was apparent, however, that the demands of Panhandle's customers east of Edgerton were greater than the capacity of the station, and the Commission accordingly determined to allocate that capacity among

such customers. In its order of July 17, 1948 accompanying Opinion No. 166, therefore, the Commission provided:

> "(B) Until October 31, 1948, Panhandle Eastern Pipe Line Company shall make deliveries to Michigan Consolidated Gas Company at Detroit and Michigan Gas Storage Company of *such volumes of gas as may be available* after making deliveries to all of its other customers east of its Edgerton Compressor Station * * * pursuant to the provisions of the effective tariffs and contracts, as follows:
>
> "Panhandle shall deliver to Michigan Consolidated 52% and to Michigan Gas Storage 48% of such available volumes of natural gas * * *" (R. 233a-234a).

The meaning of this provision had been spelled out by the Commission in its Opinion No. 166. In the proceedings culminating in that opinion and order, the Michigan Public Service Commission had asked the Commission to establish specific priorities for Consolidated and Michigan Gas Storage over Panhandle's direct sales to industries west of Edgerton under interruptible rate schedules (R. 214a, 215a). The Commission did not issue an order in those terms but pointed out that, since Consolidated's contract with Panhandle required firm deliveries, "we must assume that in the operations of its system, Panhandle will give to the deliveries thereunder the degree of priority appropriate thereto" (R. 216a).

The Commission then noted that the "dominant, if not controlling factor" governing the supply of gas east of Edgerton is the physical capacity of that compressor station but stated that, since estimates of station capacity have frequently been substantially below performance, no finding would be made as to the availability east of Edger-

ton of specific volumes of gas (R. 216a). The Commission then continued:

> "Rather we believe that Panhandle will exert every reasonable effort to deliver through that station the largest volumes of gas possible; and we shall expect that, if necessary to do so, and to the extent required, Panhandle will make appropriate curtailment of interruptible deliveries pursuant to the provisions of effective tariffs and contracts.
>
> "Therefore, although we deny the request for an order, we do, nevertheless, substantially grant the relief requested" (R. 216a-217a).

Despite the fact that in its opinion, the Commission expressly rejected Panhandle's contention that 270,000 Mcf per day was the full capacity of the Edgerton station (R. 191a, 216a). Panhandle took the position, upon entry of the order, that it had been relieved of all obligations to Consolidated except to put 270,000 Mcf of gas through the station daily and to deliver to Consolidated its specified percentage of that amount. Accordingly, Panhandle reduced the volume of its deliveries through Edgerton below the actual capacity of the station, and on some days actually fell short of 270,000 Mcf, with the result that Consolidated suffered severe shortages of gas. These shortages had to be supplied by the manufacture of gas at greatly increased cost, and Consolidated accordingly set off certain of these costs against bills rendered by Panhandle (R. 146a, 327a, 329a, 332a).

Panhandle thereupon brought suit to recover the amount of the set-offs (R. 142a-145a, 322a-324a)[9] and Consolidated

[9] This cause of action constituted Counts IV and VI of Panhandle's complaint.

filed a counter-claim for the remainder of its damages resulting from the deficiencies in Panhandle's deliveries (R. 131a-136a, 302a-306a).

In the court below Consolidated made two contentions: (1) that Panhandle was liable for deficiencies in its deliveries to Consolidated below 125,000 Mcf per day even though the Commission's order of July 17, 1948 authorized curtailment of deliveries, since Panhandle had failed to provide adequate facilities, and (2) that, in any event, Panhandle was liable for any deficiencies in deliveries resulting from its failure to deliver as much gas as its facilities permitted (Pet. App. 13a, 14a). The Court of Appeals rejected Consolidated's first contention on the ground that the Commission's order had effectively modified the maximum delivery provision of the contract (Pet. App. 14a-15a). But it held that, under the Commission's order of July 17, 1948, Panhandle's failure and refusal to deliver gas to Consolidated up to the capacity of the Edgerton station made Panhandle liable for the extra expense to Consolidated caused thereby (Pet. App. 18a). Accordingly, the court below remanded Consolidated's counterclaim and its defense of set-off to the district court for trial. Panhandle asks this Court to review that action.

ARGUMENT

1. As in the first case, the question principally raised by Panhandle is simply whether the court below properly construed and applied an order of the Federal Power Commission. It is by no means apparent why the construction of this particular order of the Commission presents a question of importance for this Court's consideration, and Panhandle certainly has not demonstrated that it has such importance. The nub of the controversy is this:

When shortages of gas occurred on Panhandle's system in Michigan and Ohio as a result of Panhandle's action in taking on its partly-owned subsidiary customer and its failure to install sufficient facilities at its compressor station at Edgerton, Indiana, the Commission issued an order directing the allocation of Panhandle's gas among its customers east of Edgerton. This order had the effect of temporarily suspending the requirement of Panhandle's contract with Consolidated calling for delivery of up to 125,000 Mcf of gas per day.

But upon entry of the order which specified a temporary reduction of Panhandle's delivery commitments because of *inadequate compressor station facilities,* Panhandle then seized upon this limited reduction of its contract obligation as an excuse to deliver *far less gas than its existing facilities permitted.* In this way, Panhandle of course had more gas available to sell to its direct industrial customers in Indiana and elsewhere west of Edgerton at prices not subject to regulation by the Federal Power Commission. This Court is fully familiar with Panhandle's direct sales program.[10] Thus, while the Edgerton station

[10] For a discussion of this program, see *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana,* 332 U. S. 507.

had at times delivered as much as 296,000 Mcf per day (R. 1277a-1280a), Panhandle reduced its deliveries far below that volume throughout the curtailment period, and on several days in October, 1948 put through the station less than 255,000 Mcf, with the result that Consolidated received far less than the contract volumes (R. 1072a-1077a).[11]

The court below held that the Commission's order of July 17, 1948 did not sanction this refusal by Panhandle to utilize its facilities fully but, on the contrary, directed Panhandle to deliver "such volumes of natural gas as may be available" to Consolidated and Michigan Gas Storage in specified percentages. In construing the order, the court of course referred to the Commission's accompanying Opinion No. 166, in which it was made clear that, by "available volumes", the Commission meant "the largest volumes of gas possible" to be delivered through the Edgerton station (R. 216a).

Panhandle claims that the Commission's statements in Opinion No. 166 are merely "precatory statements" (Pet. 36) and that, because the order of July 17 does not in so many words direct Panhandle to operate its Edgerton compressor station at full capacity, the order cannot be construed as having that meaning. Insofar as Panhandle argues that a court cannot look to an agency's opinion in construing its accompanying order, this Court's decisions are to the contrary. See *Illinois Commerce Commission v. United States*, 292 U. S. 474; *Georgia Public Service Commission v. United States*, 283 U. S. 765.

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[11] The fact that Panhandle was purposely diminishing its deliveries through Edgerton in order to make sales to industry west of Edgerton is demonstrated by the tremendous *increase* in gas put through the station on the Memorial Day weekend when such industries were shut down (R. 1279a).

Insofar as Panhandle relies on the fact that the Commission's opinion phrased the statement of Panhandle's obligation in such terms as "we shall expect that, if necessary to do so, and to the extent required, Panhandle will make appropriate curtailment of interruptible deliveries" (R. 216a), its position is likewise untenable. The *order* was affirmative and mandatory: "* * * Panhandle Eastern Pipe Line Company *shall* make deliveries to Michigan Consolidated * * * of such volumes of natural gas as may be available * * *" (R. 149a). The fact that the opinion, which explained the reason for the order, was phrased in terms of expectation is irrelevant, since the order itself was mandatory.[12]

Panhandle quotes from the Commission's Opinion No. 166-A but does not argue that it has any legal effect. Like the Commission's 1947 statements "interpreting" its order of November 2, 1945 in the First Case, Opinion No. 166-A was issued by the Commission of its own motion on the basis of information furnished by Panhandle, but without holding hearings, hearing argument or granting Consolidated an opportunity to object. Under these circumstances—and particularly the fact that the Commission purported to modify provisions of the contract not even mentioned in Opinion No. 166—the court below properly refused to consider the Commission's subsequent "interpretation" as binding.

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[12] The decisions cited by Panhandle as being in conflict are not in point. In *United States v. Atlanta, B. & C. R.*, 282 U. S. 522, and *Shannahan v. United States*, 303 U. S. 596, no order was ever entered. In *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, this Court simply held that certain findings of the Commission, not being in the form of an order, could not be reviewed under the terms of the Natural Gas Act.

Panhandle's principal contention in the Second Case is thus substantially the same as in the First Case, namely, that the court below erroneously construed an order of the Commission. The facts clearly support the court's conclusion. But more important from the point of view of this Court's exercise of its certiorari jurisdiction, the question involved has no significance whatever beyond the facts of this particular case.

2. Panhandle's claim that a prior decision of the court below is *res judicata* of the claim made by Consolidated for damages may be shortly answered.

In the first place, this contention was not so much as hinted at in the courts below. Thus, in stating (Pet. 38) that "the court below, although it cited its prior decision, failed to accord it any effect," Panhandle is being something less than candid, since it failed to raise or argue the question. Review of the issue of *res judicata* by this Court would be inappropriate for that reason alone. *McCullough v. Kammerer Corporation,* 323 U. S. 327.

Moreover *res judicata* is a defense that must be pleaded affirmatively under Rule 8(c) of the Federal Rules of Civil Procedure if it is to be relied upon. Neither Panhandle's reply to Consolidated's counter-claim nor its pleadings with reference to Count IV and VI makes any such plea, and it sought to introduce no evidence in support of that claim.

It is well established, as held in *Murrell v. Stock Growers Bank,* 74 F. 2d 827, that:

> "A party may waive his right to assert the conclusiveness or bar of a judgment under the doctrine of *res judicata.*
>
> "A former adjudication is a matter of defense in bar, and does not go to the jurisdiction. Ordinarily it must be pleaded and proved."

Since Panhandle failed to plead or prove the defense in the trial court or to argue the contention in the court of appeals, it may not properly argue *res judicata* in this Court.

Moreover, even if it were properly here, Panhandle's *res judicata* argument is without merit. The prior action to which Panhandle refers was one in which Consolidated brought suit against Panhandle for specific performance of the gas purchase contract. That action was dismissed by the district court, 80 F. Supp. 27, the decision being affirmed on appeal to the Court of Appeals for the Sixth Circuit, 173 F. 2d 784, on the ground that to order specific performance of the contract would be to invade the regulatory function of the Federal Power Commission to direct what service a natural gas company shall perform and to whom it shall make its sales. Thus, the court's decision was not that Consolidated's claims lack merit but that the injunctive relief then sought, which would have been of a regulatory nature, was within the exclusive jurisdiction of the Commission.

The present action, on the other hand, is solely for damages on account of Panhandle's failure during past periods to comply with the Commission's orders. The considerations that led the court below to dismiss Consolidated's previous action thus were not present here. There is in this case no danger that the court's order will conflict with future determinations of the Commission. Since that was the basis of the prior decision—that is, that the *remedy* was improper rather than that the *right* did not exist—the former decision clearly could not be *res judicata*.

An analogous situation was presented in *June v. George C. Peterson Co.*, 155 F. 2d 963 (C. A. 7), where the claim was made that a prior decree dismissing an injunction

action on the ground that the plaintiff had not come into court with clean hands was *res judicata* of a subsequent action by the plaintiff for damages. The court of appeals held, however, that *res judicata* was inapplicable since "the two causes of action are entirely different." There, as here, the first action was dismissed without consideration of the merits of plaintiff's claim. Clearly, a decision holding merely that a remedy is barred cannot be *res judicata* of a subsequent suit invoking a different remedy.[13]

3. Finally, Panhandle argues that the doctrine of primary jurisdiction requires prior resort to the Commission to determine the capacity of its Edgerton compressor station before damages can be allowed for failure fully to utilize its facilities. The court below fully considered this question on the basis of all the facts and concluded that it involves "the usual questions of law and fact which a court is authorized to handle and which require no special expert knowledge. The exercise of the administrative power and discretion of the Commission is in no way involved" (Pet. App. 17a).

Panhandle's contention that the Commission must first consider the matter is in the teeth of the fact that, when Consolidated sought to obtain a ruling in the trial court defining the issues the court thought should be referred to the Commission,[14] counsel for Panhandle objected to such a reference, on the grounds that a reference would unduly delay the court proceeding and that Consolidated had no right to a determination by the Commission (R. 441a-442a). And in the Court of Appeals Panhandle again

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[13] See also, *e. g., Woodbury v. Porter*, 158 F. 2d 194, 195-6 (C. A. 8); *Kelliher v. Stone & Webster*, 75 F. 2d 331 (C. A. 5).

[14] The trial court had previously ruled that certain issues were within the exclusive jurisdiction of the Commission.

stated categorically in its brief (p. 18) that "* * * it is Panhandle's position that the District Court had jurisdiction to decide the case before it *and that it would have been improper for it to have referred any part thereof to the Federal Power Commission* * * *." Now, however, having lost on the question of its obligations to Consolidated, Panhandle is arguing that a reference to the Commission would have been appropriate after all. Panhandle's argument is thus one solely of expediency, not of principle.

In essence, Panhandle's claim is that the question of the capacity of the Edgerton station is technical and complex and should therefore be tried before the agency that regulates the industry. To give color to this contention, Panhandle has gone to great lengths (Pet. 41-43) to make the question seem technically difficult and to attempt to introduce questions of future policy—despite the fact that the action is one for damages arising out of events that occurred seven years ago.[15]

Unquestionably all of the operating conditions affecting the capacity of Edgerton station on any particular day are ascertainable from Panhandle's records. Once these are determined the question reduces itself to mathematical calculations entirely familiar to gas engineers, as to whether gas which was delivered direct to certain industries west of Edgerton on that day could have been put through Edgerton and delivered to Consolidated and Michigan Gas Storage. No question of policy is involved

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[15] Panhandle's argument is that to permit the court to determine these questions would encourage pipeline companies not to cooperate with the Commission in the future in emergency situations for fear of subsequent damage suits (Pet. 43). The short answer is that if Panhandle had complied with the Commission's orders there would have been no suits.

here for the Commission long ago ruled that, for the period here involved, all available gas should be delivered to those companies. Certainly this is a question no more difficult or complex than many courts are regularly called upon to consider and determine. The court below, which had read and considered the entire record and was intimately familiar with the matter, concluded that the issues were well within the proper sphere of the district court.

The case of *Armour & Co. v. Alton R. Co.*, 312 U. S. 195, cited by Panhandle as being "almost squarely in point," is quite a different matter. Petitioner there sought a mandatory injunction that would have effectively changed transportation practices sanctioned by the Interstate Commerce Commission for many years. This Court held that before a court could decide whether certain contracts had been violated, many complex administrative problems must be determined by the Commission, including such questions as whether a railroad must be required to construct terminal facilities. Here, on the other hand, the question is simply whether the court or the Federal Power Commission shall determine whether Panhandle fully utilized the capacity of one of its compressor stations. The facts and issues in the two cases are entirely dissimilar.[16]

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[16] *Montana-Dakota Utilities Company v. Northwestern Public Service Co.*, 341 U. S. 246, also cited by Panhandle (Pet. 46), involved the question whether a court could determine the reasonableness of the rates of a company subject to the Commission's jurisdiction. Obviously this was a mater committed entirely to the discretion of the Commission.

CONCLUSION

This case has been in litigation for nearly nine years. Panhandle has been heard and its arguments considered by two able courts. Its request for further review represents nothing more than the efforts of an unsuccessful litigant to exhaust all possible remedies. There are no questions of general importance here involved and nothing resembling a conflict of decisions.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 606

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*

v.

MICHIGAN CONSOLIDATED GAS COMPAY, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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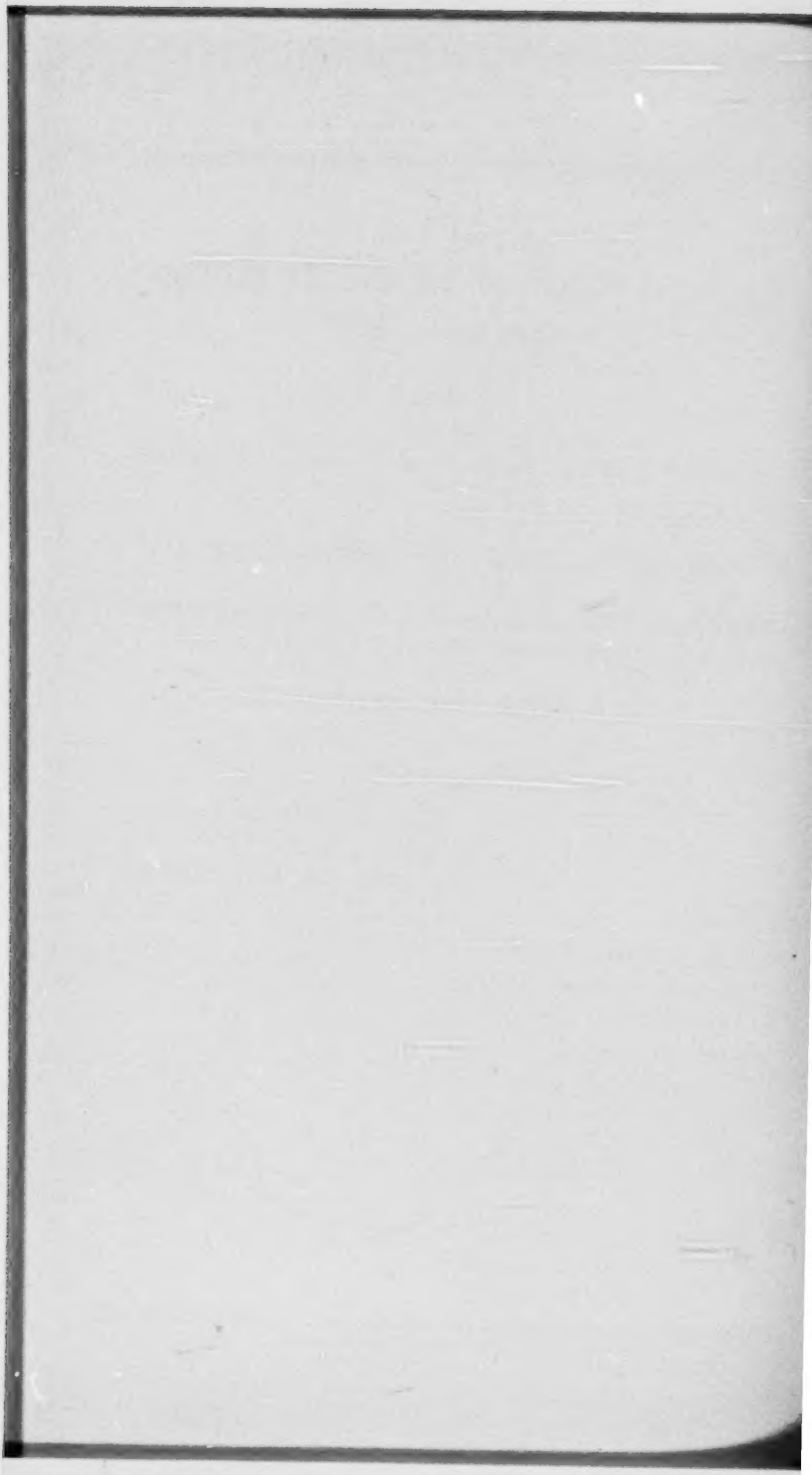

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REPLY BRIEF FOR PETITIONER

FIRST CASE

Respondent's (Consolidated's) response to the first case presented by the petition for certiorari simply ignores certain material facts. The argument is that: (a) the provision of the rate schedule filed by petitioner (Panhandle) and accepted by the Federal Power Commission "prevented" or "prohibited" Consolidated's sale of firm gas to new customers in amounts

in excess of 1,200,000 therms annually; (b) accordingly, that provision in the rate schedule affected "terms and conditions of service"; (c) the Commission excluded "terms and conditions" from its order of November 2, 1945, adopting Panhandle's new rate schedules; (d) therefore, the court below merely interpreted the Commission's order as not approving or accepting the 1,200,000 therm provision because that was excluded from consideration by the Commission; and (e) accordingly, the decision of the court below did not constitute a collateral attack upon the Commission's order.

(a) *Rate Schedule Approved by the Commission Did Not Involve Contract Volumes.* It would be impractical here to cull from the Brief in Opposition (Br.) all of the misconceptions or misstatements it contains regarding the effect of the rate schedule approved by the Commission in its order of November 2, 1945. The rate schedule is described (Br. 4) as introducing two new elements: (1) the base load method of fixing rates; and (2) "a condition designed to effectually prohibit resale of firm gas by the purchasing utility to new customers of the utility using gas in excess of 1,200,000 therms annually."[1]

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[1] It is inferred (Br. 5) that Panhandle included in a prior proposed rate schedule a provision which "would have prevented a utility from purchasing any firm gas for resale to new large industrial customers" but that provision was amended in such a way as to not, in terms, impose such a prohibition. The record on file with the Clerk (Defendant's Exhibit No. 8, not printed) disposes of that inference. The first schedule submitted by Panhandle, which is contained in that exhibit, is not, insofar as is material here, different in any way from the schedule actually approved by the Commission.

Without any support in the Record, respondent asserts that prior to 1942, Panhandle's rates seriously limited resales by utilities for industrial uses and that after its rates were ordered reduced and such sales became feasible, Panhandle desired to prevent its utility customers from taking on new industrial customers since Panhandle had by then initiated a program of making direct sales to industries. For that reason, it is asserted that Panhandle included the 1,200,000 therm provision of the rate schedule. From that, it concludes (Br. 6) that its unquestioned contract right to sell 125,000,000 cubic feet of gas per day to such customers and under such circumstances as it chose was destroyed.

There is simply no warrant for these statements. Panhandle's rate schedule did not impinge upon the contractual right of respondent to take 125 million cubic feet per day from Panhandle. The rate schedule did no more than (1) impose a limitation upon the use to which the gas included in the base load could be put if the base load rate of 1.85 cents per therm was to apply, and (2) provide a means for limiting the base load so that when gas was taken on a firm basis in order to serve a new industrial customer more than 1,200,000 therms per year, the rate would be 2.6 cents per therm. Respondent cannot point to any provision of the rate schedule or any part of the record which would support the assertion that its contractual right, insofar as the quantity of gas it could take on a firm basis, was limited.

The fact is, as forcibly brought out by Consolidated's reference (Br. 12, N. 7) to what transpired at the Commission hearings preceding the November 2, 1945, order, that the rate schedule in no way affected or

limited the previously existing contract volumes. Panhandle's over-all rate level was reduced through the medium of classifying the new rates to be charged according to the use to which the gas sold was to be put (Pet. 24). Consolidated apparently wanted the benefit of a rate reduction, but without the Commission-approved rate structure which was a concomitant part of the rate reduction.

There is no warrant for the assertion that the hearings did not relate to anything but the dollar amount of the rates and that Consolidated was misled. It is clear from the record in this case that Consolidated was not misled and that the 1,200,000 therm provision was specifically taken up during the hearings. See Pet. 10 *et seq.*, R. 1086 *et seq.*, 930a-936a, 938a-945a, 1204a *et seq.*, 1205a N. 2.

(b) *New Rate Schedule Did Not Involve Terms and Conditions of Service.* Since Panhandle's rate schedule did not affect Consolidated's contractual right to take 125 million cubic feet of gas per day from Panhandle, then in fact the rate schedule and, consequently, the Commission's order of November 2, 1945, did not affect "terms and conditions" of service. The only thing the new rate schedule did was to require the payment of a higher price for gas taken contrary to the 1,200,000 therm provision of the rate schedule.

It is quite clear from the Record that the Commission did not consider the therm provision as a term or condition of service. It was simply a part of the rate structure and approved as such.

(c) *Court Below Did Not Merely Construe Order of November 2, 1945.* Consolidated, assuming that the

1,200,000 therm provision[2] limited its contract right to 125 million cubic feet per year, seeks to show that the hearings concerning Panhandle's new rate schedules excluded the therm provision and that the Commission did not purport to approve it. This is patently wrong, for the Commission itself (R. 1030a) clearly said that the provision was in effect and applicable.

Assuming for the moment, purely *arguendo,* that the provision (a) did involve "terms and conditions" of service and (b) was not expressly approved by the Commission, it still does not follow that the court below was correct in condoning avoidance of the rate schedule provisions. Consolidated's argument is self-defeating, for the Commission did not disapprove of that provision and in fact accepted the new rate schedule as drafted. The rate schedule "accepted" by the Commission is binding on buyer and seller alike "and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Commission,* 341 U.S. 246, 251-2.

Consolidated indulges in the assumption that the court below merely construed the Commission's order of November 2, 1945, and, because the Commission had reserved the question of terms and conditions of service, held that the Commission's order did not purport to adopt the 1,200,000 therm provision. This is completely unsupportable. The Court of Appeals for the Sixth Circuit clearly held that the 1,200,000 therm provision

> "*has no legal effect.* The Commission did not take the *required statutory steps* to put the terms and

[2] A therm is a unit of measurement of gas roughly equivalent to 100 cubic feet.

> conditions of service established . . . into effect so as to supersede the contractual provisions." (App. to Pet. 8a) (Emphasis supplied)

The whole import of the Court of Appeals decision was that the Commission failed to make the *necessary findings* to support that provision and accordingly that the *adoption* of that provision was not proper.

Panhandle argued that sufficient findings had been made. The court rejected this contention and said (App. to Pet. 12a):

> "* * * the decisive point is that . . . Gd-1 APPLICABLE (c) [the therm provision] *had no legal effect* . . . .* * * As Panhandle's obligation to deliver limited amounts of gas for resale under the new schedules *was not based upon the essential statutory findings, the order was not effective to supersede the contractual obligations* of the amended agreement of 1935 . . . ." (Emphasis supplied)

There is no suggestion in the opinion of the court below that it was merely construing the order. For alleged lack of essential "statutory findings," it expressly held the order *invalid* insofar as it adopted the 1,200,000 therm provision.

The decision, therefore, is a collateral attack upon the Commission's order. Contrary to Consolidated's assertions (Br. 11), the issue before this Court is not,

> "a narrow and, in the main, factual question, namely, whether the Commission's order of November 2, 1945, approving Panhandle's proposed rates also constituted approval of its proposed condition prohibiting sales to new industrial customers."

It is clear that the Commission did adopt the therm condition as a part of the rate structure and that the court below held, not that the Commission did not adopt it, but that it adopted it in an illegal fashion without the necessary findings.

Consolidated does not meet the question whether the Commission's action in this case was proper in view of this Court's decision in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, (Pet. 18 *et seq.*). It is submitted that this question cannot be belittled by simply misconceiving or misstating the decision below. That the issue is important is manifest, for this Court now has pending four similar cases (Pet. 21) involving related issues. In short, the decision below is a collateral attack upon a Federal Power Commission order; and, aside from that, it presents a novel question as to the requirements imposed upon the Federal Power Commission by Section 5(a), Natural Gas Act.

(d) *Mobile and Sierra Cases.* On February 27, 1956, this Court handed down its decisions in No. 17, 31, 51, and 53, October Term 1955, *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation and Federal Power Commission, etc.; Federal Power Commission* v. *Sierra Pacific Power Company, etc.* The importance of the questions presented in this case is further emphasized by this Court's decision in the above-mentioned cases. Those cases, as has been pointed out (Pet. 21 *et seq.*), involved unilateral filings by the natural gas company of *rate increases.* This case involves filing by Panhandle *pursuant to an order of the Commission decreasing its rates.* This, as was pointed out (Pet. 22), was the second step in the rate-making procedure under Section 5, Natural Gas Act;

and it is Panhandle's contention that necessary findings had already been made when the Commission adopted the new schedules.

Even assuming that the necessary findings were *not* made regarding each contract affected by the Commission's order approving the new rate schedules, the result under the most recent decisions might well be that the *higher* rates contained in the contracts superseded by those rate schedules have never been validly abrogated by the Commission. The Commission's original order decreasing Panhandle's rates simply found that the rate level collected by Panhandle was excessive and ordered a reduction in the total rates collected by a specified amount. *The City of Detroit* v. *Panhandle Eastern Pipe Line Company*, 3 F.P.C 273, 292 *et seq.* In that order there was no reference to any specific contract.

The question in this case is whether in a Section 5 proceeding the Commission must, when setting a rate level for a whole pipe line operation as opposed to the individual contract situation involved in the *Mobile* and *Sierra* cases, give specific attention to every single provision of every single contract between the gas company and its customers. As was pointed out in the Petition (Pet. 18 *et seq.*), the Commission had lowered Panhandle's rate level and had under consideration a rate schedule which would achieve the new level adopted in a fashion calculated to eliminate discriminations and unfairness from its details. We repeat, this is not a case involving unilateral change by the natural gas company but a change ordered over the objection of the natural gas company. The question comes down to the extent to which the Commission must refer and make findings regarding each contract

between that natural gas company and its many customers. The Court in the *Mobile* decision (page reference not yet available, 24 LW 4093) pointed out

> " * * * On the other hand, denying to natural gas companies the power *unilaterally* to change their contracts in no way impairs the regulatory powers of the Commission, *for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest.* The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other." (Emphasis supplied.)

SECOND CASE

Consolidated has apparently sought to obscure the issues in this case. No attempt will be made to correct each misstatement of fact, as the record speaks for itself. It is clear, however, that Panhandle was not callous to the demands upon its system in undertaking the sale to Michigan Gas Storage (Br. 18-19, 23). Rather, the record shows that Consolidated had never taken its full contract volumes; and, as a consequence, Panhandle's full capacity was not being used (Pet. 27).

It is erroneously asserted (Br. 21, 23) that "Panhandle reduced the volume of its deliveries through Edgerton below the actual capacity of the station." No record citation supports this statement; and indeed it is contrary to the facts. Considerable point was made in the Petition (Pet. 41 *et seq.*) of the complicated factors involved in a determination of compressor station capacity. And even Consolidated admits (Br. 20) that because estimates of compressor station capa-

city frequently do not materialize, the Commission did not determine the capacity in this case.

By glossing over the facts, it is asserted (Br. 28) that the question of the capacity of Edgerton station is not a complicated technical question within the primary jurisdiction of the Commission—that it "reduces itself to mathematical calculations." This assertion must be challenged for it is obviously in error (Pet. 41 *et seq.*). Why would the Commission refuse to make the determination if only mathematical calculations were involved? The determination of compressor station capacity *for any period of time,* past, present, or future, involves technical and policy questions which a court cannot properly determine.

Panhandle is accused of inconsistency regarding the primary jurisdiction question (Br. 28-9). Such is not the case. Clearly, there is a difference between the "jurisdiction" of a District Court and its power to grant relief. *Montana-Dakota Utilities Co.* case, *supra.* As pointed out in the Petition (Pet. 47, N. 34), the basis for Panhandle's objection to reference to the Commission was that the request was made too late and for purposes of delay (R. 437a). Consolidated's motion[3] was filed at the pre-trial of the case, *three years* after the District Court had granted summary judgment as to its original claim on the ground that

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[3] The record shows the reservations with which Consolidated's motion was made (R. 434a). It sought reference without acceding to the Federal Power Commission's jurisdiction. Counsel stated at that time (R. 435a):

> "We make this request not because we believe these issues are not within the jurisdiction of this court . . . we make this petition only because the court has ruled that those issues are . . . within the jurisdiction exclusively of the Federal Power Commission."

the Federal Power Commission had primary jurisdiction.

As pointed out in the Petition, the decision of the court below placed this case in a completely different posture inasmuch as it had been held in prior litigation between the parties and for a number of years in the instant case that Consolidated's claim was within the primary jurisdiction of the Commission.

Panhandle's *res judicata* argument is (Pet. 37) predicated upon and a part of the larger primary jurisdiction argument. The *res judicata* argument further demonstrates the correctness of the primary jurisdiction argument. Whether, as Consolidated puts it (Br. 18) Panhandle may raise the "defense" of *res judicata* in this Court, is not the question. Certainly this Court may notice plain error. Rule 40(d)(2); *United Brotherhood* v. *United States*, 330 U.S. 395, 411-12 and cases cited; *Terminiello* v. *Chicago*, 337 U.S. 1. This is particularly so where the question is presented in the Petition. In any event, it is difficult to believe that the court below was entitled, as between the same parties and with respect to the same underlying issue, to reach diametrically opposed conclusions.

CONCLUSION

The decision of the court below, as was demonstrated in the Petition, presents a number of important problems under the Natural Gas Act. It is submitted that by any objective standard, Consolidated has failed to answer the arguments presented in the Petition. The decision of the court below conflicts in many respects with decisions of this Court and the Courts of Appeal

of other circuits, and the questions presented by the Petition are questions which should be decided by this Court.

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